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IN THE

Supreme Court of the United States

No. 75-197

OCTOBER TERM 1975

In the Matter of the Arbitration
between INTSEL CORPORATION,
Petitioner-Respondent,

-against-

M.W. ZACK METAL COMPANY,
Respondent-Petitioner.

WRIT FOR SUMMARY REVERSAL OR FOR CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

In the Matter of the Arbitration between INTSEL CORPORATION,

Petitioner-Respondent,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Petitioner.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of M.W. ZACK METAL COMPANY to this court seeking a summary reversal or a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its decision and judgment affirming on the opinion of the district court which granted the petition of Intsel Corporation (hereinafter referred to as Intsel) to confirm an award by a single arbitrator and denying vacation of such award on the cross-motion of the petitioner, M.W. Zack Metal Company, (herein-

after referred to as Zack), respectfully shows:

OPINIONS BELOW

The decision of the Court of Appeals affirming the order of the district court was made on March 13, 1975. It was not officially reported and it is appendix A herein. The order of the district court is dated May 9, 1974, it, too, was not officially reported and is marked Appendix B.

JURISDICTION

On the order and judgment of the Court of Appeals a timely petition for a rehearing by the panel or by the court en banc was made but denied by separate orders, both dated May 7, 1975. Both are Appendix C hereto. This court has jurisdiction under 28 U.S.C.A. 1254 (1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution: No person shall be deprived of life, liberty, or property, without due process of law * * *.

Amendment XIV to the Constitution: * * *;

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nor shall any State deprive any person of life, liberty or property, without due process of law; * * *.

THE ARBITRATION ACT

9 U.S.C.A. Section 6. Application heard as motion. Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 10. In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration - * * *

(d) Where the arbitrators exceeded their powers, * * *.

OTHER UNITED STATES CODE PROVISIONS

28 U.S.C.A. 1254: Court of Appeal: certiorari; appeal; certified questions;

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

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(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; * * *.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 7 (b) Motions and other Papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. * * *.

Rule 12 (b) How Presented. * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *.

Rule 56. Summary Judgment

* * *

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(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *.

(e) Form of Affidavits; Further Testimony; Defense Required. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. * * *.

Rule 81 (a) To What Proceedings Applicable. * * *

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(2) These rules are applicable * * *

(3) In proceedings under title 9, U.S.C. relating to arbitration, * * *"

NEW YORK STATE CIVIL PRACTICE LAWS AND RULES

Section 7511. Vacating or modifying award. * * *

(b) Grounds for vacating

1. The award shall be vacated * * * if the courts find that the rights of that party were prejudiced by: * * *

(iii) an arbitrator, or agency or person making the award exceeded his power or * * *.

QUESTIONS PRESENTED

1. Doesn't the arbitration act grant an aggrieved party to an arbitration award the remedy of setting aside the award for an excess of authority so that where it appears that the loser claims that the conceded, admitted and uncontroverted facts placed before the arbitrator compelled a dismissal of the arbitration, doesn't due process require the District Court to examine the fact claims of the loser and decide whether they are correct or if

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they raise a fact issue as to whether the award is an excess of authority that a trial of the issue be ordered. Subsidiarily; isn't it error for the District Court to rule that a speedy determination is the policy of the law in arbitration and as questions of fact and law are for the arbitrators, the court could confirm without examinations of the loser's fact claims to an award which is said to be in excess of the power of the arbitrator.

2. If the conceded, admitted and uncontroverted facts placed before the arbitrator show that the parties entered into a series of contracts to deal with the purchase and sale of aluminum goods to be manufactured according to government specifications, the first three in writing and the last oral, the first writing being superseded by the second writing, and the second and third having been breached by the seller's failure to deliver as agreed and were replaced by an oral agreement of novation made when the proferred delivery of the goods two months after due date was turned down,

under which novation the buyer agreed to resell the goods for the seller's account on a commission basis and against the seller's promise to pay the expenses of the handling and storing, isn't it the duty of the court first to determine which of the contracts are arbitrable and secondly if such a contract creates an obligation on the loser for the award made, and that the loser breached the contract under which the arbitrator acted.

Subsidiarly: If the writings also contained a clause that the contract was to be construed according to New York law, and this is a diversity suit, could the District Court ignore the applicable New York law to novation agreements as putting an end to the powers of the arbitrators under the writings which were superseded by the execution of such oral novation agreement.

3. Where the award was allegedly made on the writing first in time, despite respondent's own writing cancelling said first contract, and the

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amount awarded was for a greater quantity of goods described than is called for in any of the writings upon which the arbitrator said he had acted, wasn't the arbitrator making of a new agreement for the parties, and wasn't he unlawfully manifesting a disregard for New York law and an excess of power.

4. Simply put, didn't the reluctance of the Federal courts to examine the facts deprive the petitioner, the losing party to the award, of due process when the conceded, admitted and uncontroverted facts compelled a decision for petitioner under the law agreed upon.

STATEMENT OF THE CASE

Petitioner, Zack, is a metal broker, at Detroit, Michigan. Intsel, the respondent, is also a metal broker but in New York City. Intsel is part of a group of French companies called Pechiney, among which are metal fabricating mills. Intsel buys and

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sells with the components of the group and is the go between with those within and those outside the group. Both Zack and Intsel have been doing business with each other for years. In 1968, Zack was asked by a customer in Detroit, Fox Manufacturing Co., if he could supply an aluminum tubing to government specifications which Fox needed for a government contract.. Zack called his New York representative, Krasnov, who called Intsel. Intsel passed the specification on to one of its mills. The mill said it could manufacture the tubing and an agreement was reached on 40,000 lbs. of the tubing in four sizes with 10,000 lbs. allocated to each size. Zack wrote its purchase order of January 7, 1969; see Schwartz exhibit G, p. 50* of appendix, and Intsel wrote its confirmation of sale to Zack of January 13, 1969, for these 40,000 lbs.

It is important to note that this confirmation to Zack was part of some sort of pad arrangement with carbons between the several forms in the pad, so that copies of the face sheet was made on forms

* References are to pages of Appendix below unless otherwise stated.

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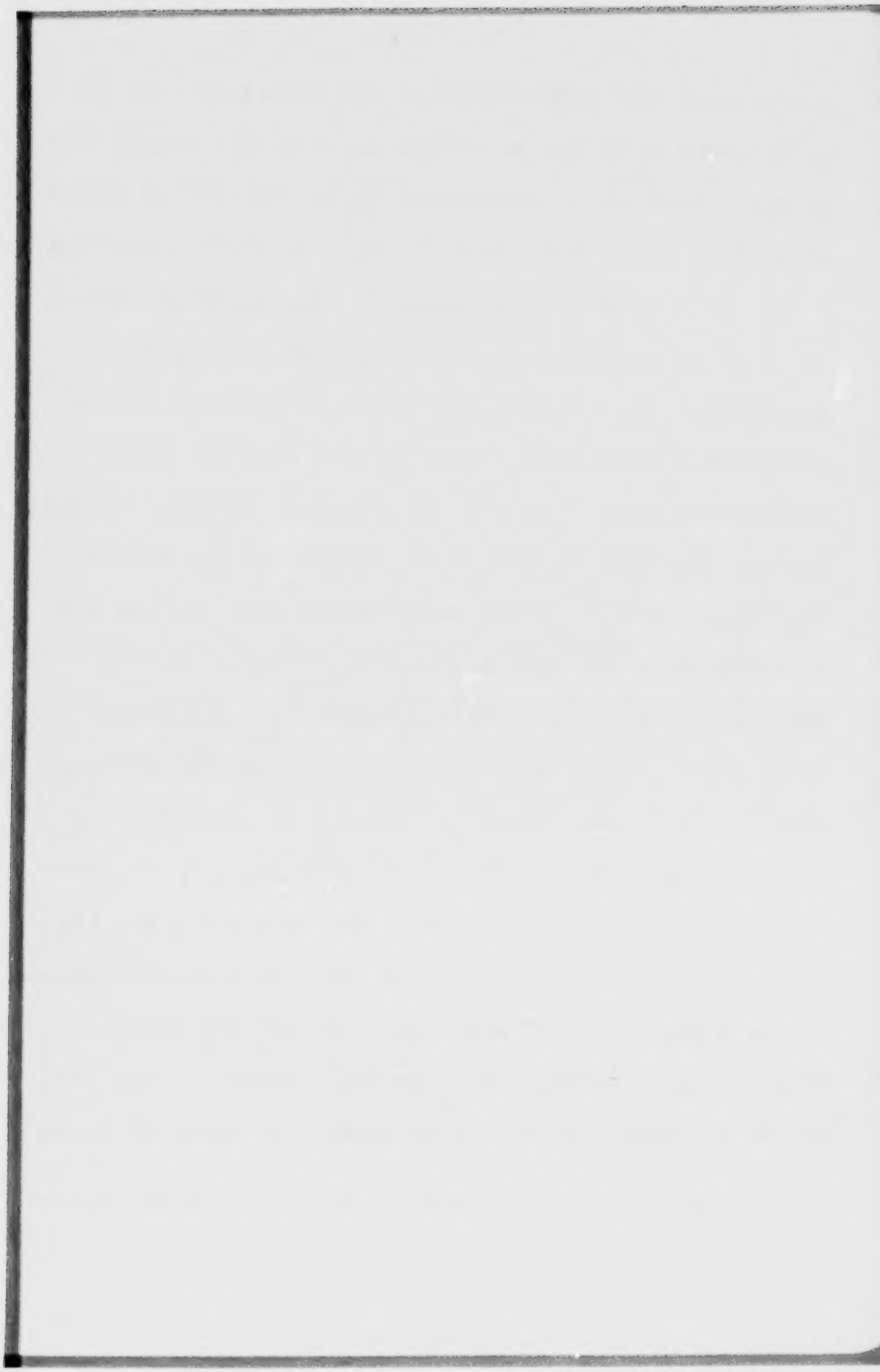

that served different purposes. One was the form that went to Zack confirming the sale. Another form containing the identical description of the goods went to Intsel's mill in France in confirmation of its purchase from the mill. Each being carbon copies, the description of the goods by Intsel was the same to petitioner as it was to its mill. Intsel would thus buy what it had sold using identical descriptions of the goods in the separate confirmations. However, the two counterparts differed. These differences are important, principally because the award was made on the confirmation to the mill, not on the basis of the contract formulated by Zack's purchase order and Intsel's confirmation.

In the latter part of January, the mill said it was unclear as to the specifications and asked for a sample. A sample was obtained and sent to them. Intsel was told by its mill that they could copy the sample. Intsel and Zack agreed that instead of the full quantity of 40,000 lbs. only a trial

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order of 10,000 lbs. would be attempted. Intsel issued a change order dated March 14, 1969 and sent a confirmation to Zack (see the Exhibit at p. 115 of the appendix.) That particular document is an Intsel writing. It was offered to the arbitrator by Intsel, it was conceded by Zack. The arbitrator deemed it unnecessary to mark it in evidence.

The 10,000 lbs. were fabricated, shipped, delivered to Fox, who approved and the shipment was paid for. This, too, is conceded.

Next, it is conceded that Zack, on June 18, 1969, ordered 55,000 lbs. more of several specifications of the tubing; (see Ex. 2, p. 50 of Appendix). Intsel confirmed the sale to Zack by Ex. 3, p. 51. These documents show that the parties had agreed to a delivery on the first 15,000 lbs., a.s.a.p., obviously meaning as soon as possible. The balance was for September arrival at Detroit. Also, it is conceded that in the back of Intsel's confirmation were certain clauses. Important were the arbitration clause, which is No. 9; the clause requiring con-

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struction of the contract in accordance with the laws of the State of New York which is clause 8; the prohibition against modification unless in writing which is clause 5; and clause 1, which states that each shipment is a separate sale, p. 8a, to Appendix.

Also important is to note that Intsel's confirmation of the June sale, Ex. 3, states with regard to its first four items, which are the four items of the January contract that item 1 of the January contract was cancelled; item 2 of the January contract was increased by the June contract to 15,000 lbs. and it was included in the June contract; item 3 of the January contract was shipped and item 4 of the January contract was cancelled. This left nothing to be done under the January contract. Hence, the January contract was terminated by respondent in writing. Yet, it was the basis of the award, (see the award and Exhibit C, p. 9).

The third written purchase, on July 29, 1969, was when Zack ordered 10,000 lbs. of aluminum rods

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which sale was accepted by Intsel by its confirmation of August 7, 1969. Shipment was to be made at the same time as the tubing purchased in June, viz; September arrival at Detroit. (See exhibits 4 and 6 pp. 52 and 100.)

Next, the first 15,000 lbs. of the June order which should have been shipped a.s.a.p., had not arrived by September 1, 1969, and Krasnov said he checked on the whole shipment in September. Krasnov testified before the arbitrator, unopposed that he called Mernick of Intsel almost daily, beginning early in September, and sometimes several times during the day about the date of shipment, urging the arrival as agreed. Mernick could not get a shipping date out of the mill and he could not promise Krasnov any shipping date. Approaching the end of September, Krasnov told Mernick to telex the mill that Zack would cancel if a shipping date was not fixed immediately. Still no shipping date was forthcoming. Krasnov reported his failure to get a firm shipping date, let alone a promised delivery

for September, to Zack. Zack told his customer, Fox, who cancelled and covered himself elsewhere. Zack told Krasnov to cancel. Krasnov called Mernick and told him that Zack's customer had cancelled and he was cancelling Zack's contract with Intsel.

These conversations of Krasnov with Mernick remain uncontroverted. No one from Intsel came forward to deny them. In fact, Intsel's only witness, a Mr. Fifield, said he knew nothing of the details of the transaction. He learned of this transaction in 1971. He limited his testimony to the identification of papers. He identified the telexes with his mill in France showing Intsel's effort at buying the goods from the mill, and he identified the telexes Mernick had exchanged with the mill in September trying to get a delivery or shipping date. One of such telexes, dated September 24, was identified by Krasnov as the one which was supposed to have stated Zack's threat to cancel, but which read, instead, that Zack was angry, (p. 116). Also, Mr. Fifield identified some of the January

documents and, at first, said that Exhibit A (p. A 7) was the contract between Intsel and Zack whereas Exhibit A was Intsel's confirmation of its purchase from its own mill. When it was called to his attention that Exhibit A was his purchase from its mill, he admitted that fact (p. 20-30). Also, he testified that on every contract of purchase and sale, time was of the essence of the contract, (p. 31).

Some months after Krasnov had cancelled the contract, Zack received shipping documents from Intsel showing that there were three shipments on board three ships arriving late in November, 1969 with the goods. Requests for cash payments as per contract terms accompanied these shipping documents (see Ex. 7)

Zack called Intsel direct. He spoke with Mr. Vic Besso, whom Mr. Fifield had identified as an executive vice-president and superior to him. Zack rejected the tender of delivery and told Mr. Besso, that Krasnov had cancelled back in September for their failure to deliver as agreed. Zack said

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that he had lost his customer, he had no use for the goods. Mr. Besso asked could he move the goods anyway. Detroit, with its many manufacturing concerns would be a better market for such goods. Perhaps Fox might get a re-order for his government contract. Zack said he would try. It was agreed that the writings no longer counted and the goods would be taken in free of the contract price, stored by Zack pending sale, and they would be sold for Intsel's account.

The goods then were entered by Intsel and released to Zack, free. The details of the delivery were handled by Besso's assistant, a Mr. Romano. Zack picked up the goods on December 11, 1969, according to the shipping receipts. This pick-up and the subsequent attempt at selling the goods and storing them meanwhile could not spell out an obligation to pay for the goods, but it was the consideration for the offer of Besso to clear the goods through customs and deliver them to Zack for sale for their own account. This new arrangement created

a valid contract of novation, and when Zack took in the goods and tried to sell them, he had performed his part of the bargain. Thus, the novation was executed.

PROCEEDINGS AT THE ARBITRATION

Zack was not successful in selling the goods. On March 31, 1971 or almost 16 months after the novation agreement was made, respondent made up a statement for the goods still unsold at the price stated in contracts numbered 2 and 3 and sent it to Zack. (see Ex. resp. D-1 at p. 118 of Appendix). This was the first time since the goods were delivered to Zack in December 1969, that a bill for the goods was sent by Intsel. Zack responded by letter reminding respondent of the novation agreement and demanding that as the goods were yet unsold, Intsel should send Zack shipping instructions for them. Intsel never gave any shipping instructions and the goods continue to this day to be in Zack's possession subject to Intsel's shipping instructions.

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On April 12, 1973, Intsel caused their lawyers to serve a notice to arbitrate. An arbitrator was appointed and on November 8, 1973 a hearing was held.

No issues for arbitration were specially settled, except as they appear from the demand to arbitrate and Zack's answer. The demand stated:

Goods sold and delivered under	
Intsel's contract #50240	$30,548.16
Intsel's contract #50617	4,775.44
	$35,253.60

(See p. 58, and Ex. A at p. 70).

The answer denied the liability for the money demanded and asserted a counterclaum for $7,500 for expenses incurred for Intsel's account for handling the goods (Cataldo's Ex. 1, p. 54). In preparation for the hearing before the arbitrator, Zack served and filed a memorandum of law claiming that the oral novation was effective as superseding the prior written contracts according to New York law, that no disputes existed for the arbitrator to settle; and that the novation claimed was one made with Intsel's Mr. Besso and Mr. Romano.

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At the hearing, Zack inquired about a stenographer to make a record (p. 13-14). The arbitrator said it was unusual to record the proceedings and he went on with the hearing (p. 13-14). Only three witnesses testified, one for Intsel and two for Zack; and, writings were offered into evidence. This was the extent of the evidentiary proceedings before the arbitrator.

Intsel's sole witness was its Mr. Fifield who admitted that he had no personal knowledge of the transaction (p. 27). He identified documents from Intsel's files.

For Zack, both Mr. Zack and its New York representative Mr. Krasnov testified.

Mr. Krasnov testified unopposed that he had cancelled the whole deal in September 1969 when it was obvious that no delivery would be made at Detroit in September

Mr. Zack testified, also unopposed, to the rejection of the late tender in November and to the novation agreement under which he agreed to sell

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the goods in the Detroit area for Intsel's account to help Intsel to recover its loss.

No one from Intsel denied or contradicted this testimony of Zack and of Krasnov before the referee and such testimony stood uncontroverted. Intsel's sole reliance for proof of Zack's obligation to pay for the goods was upon the sales agreements without proof of delivery or offer to deliver as agreed.

The following Exhibits were placed before the arbitrator without objection.

1. Zack's letter of January 7, 1969 enclosing its purchase order of the same date and the purchase order itself for 40,000 lbs. of aluminum tubing of specified sizes.	offered by Intsel, marked Cl. Ex. 1-a
2. Intsel acceptance dated January 13, 1969, called mill certificate sent to Zack.	document conceded but not marked by arbitrator
3. Intsel's confirmation to Zack dated March 14, 1969 reducing the quantity of the January contract to 10,000 lbs.	document conceded not marked by arbitrator

4. Zack's purchase order of June 18, 1969, for 55,000 lbs., delivery of first 15,000 lbs., as soon as possible, and balance at Detroit in September 1969.

offered by Intsel, marked by arbitrator, Cl. Ex.2-a

5. Intsel's confirmation of sale to Zack dated June 23, 1969 cancelling balance of January contract and accepting terms of Zack's purchase as to quantity, specifications, prices and delivery of first 15,000 lbs. as soon as possible and balance of order September arrival at Detroit.

marked by arbitrator, Ex. Resp.-A

6. Zack's purchase order of July 29, 1969 for 10,000 lbs. rods dated July 29, 1969.

offered by Intsel, marked by arbitrator as Cl. Ex. 6-A

7. Intsel's confirmation of sale to Zack dated August 7, 1969

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	accepting Zack's order of July 29, 1969.	offered and conceded by Intsel, but not marked by arbitrator
8.	Intsel's shipping invoice No. 10329 dated November 19, 1969 for one of the three shipments rejected showing sale was for cash on delivery.	offered by Zack, conceded by Intsel and not marked
9.	Telex message from Intsel to its mill dated September 24, 1969 regarding Zack's demands for a shipping date.	marked by arbitrator as Cl. Ex.2-B
10.	Invoice from Intsel to Zack for $35,253.60, the contract price for the goods shipped under the June and August contracts and identified by Zack as the first invoice that was received by him.	marked by arbitrator as Resp. Ex. D-1

There were other exhibits offered but only the

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foregoing are needed to prove petitioner's point of excess of authority. None of the other exhibits before the arbitrator dispute, deny or other-wise cancel the legal effect of the foregoing exhibits. The foregoing states, in full, the proceedings before the arbitrator.

They were put forward to the district court in affidavit form by Zack. The foregoing exhibits were also advanced to the court. At issue, was the petition to confirm and Zack's motion to vacate. In opposition to vacature, Intsel filed an affidavit which did not deny one specific of the foregoing facts but rested only upon name calling such as "grossly distorted and factually incorrect in many respects" p. 56, but it did not identify what was distorted or incorrect. Also at p. 68 is a paragraph of generalizations of name calling but not a word about the failure of Intsel to call Besso or Romano or of how the documents denied Zack's claims of cancellation and novation. Not a word is uttered in defense of the manifest error of the arbitrator

in saying that he acted on the basis of the January 13, 1969 contract which had been terminated by Intsel in its own writing of June 23, 1969 and marked by the arbitrator as respondent's A. How could he award on a terminated contract is not explained by Intsel. It said that both its January 13 confirmation and June 23 confirmation contain Intsel's file number 50240. The arbitrator never mentioned the file number. Instead he identified the contract under which he acted by date.

Other than the foregoing immaterial allegations there is not a single word uttered by Intsel in denial of Zack's allegations in the affidavits before the district court of the nature of the proceedings that was had before the arbitrator.

THE AWARD

The award simply stated that in accordance with the powers granted him by the arbitration agreement entered into "by the above named parties, and dated January 13, 1969 and August 7, 1969" he awards $35,253.60 with interest and costs. The award of

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$35,253.60 was for an alleged 70,888 lbs; see Intsel's computation at p. 69. Yet, the January and August contracts referred to by the arbitrator were for a total of 50,000 lbs. These quantities are referable to the June and August contracts only. Awarding under the wrong contract can't be anything but an excess of authority. A serious enough error was made by the arbitrator when he awarded upon a contract for the goods delivered under another contract but Intsel, in its petition to confirm, made matters worse. It alleged that the January 13, 1969 contract referred to by the arbitrator was its own confirmation of its purchase from its mill in France, see Ex. A, p. 7 of Appendix. This was marked Cl. Ex. 1-B by the arbitrator but Intsel conceded that it was not a document sent to Zack. In fact, Fifield conceded that its confirmations to its mill were never communicated to Zack and were never discussed with Zack pp. 19-20, 30. How then can an award be based upon a writing that was not the contract of the parties, at any time.

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Further, the contracts were made up of purchase order and sales confirmation. The arbitrator awarded only on the basis of the sales confirmation. Why? Wasn't this evidence of the arbitrator not understanding the nature of the contract under which he was acting.

REASONS FOR GRANTING WRIT OF CERTIORARI AND FOR SUMMARY REVERSAL

The single important error below was the court's refusal to do what is inherently necessary to ascertain when an award is claimed to be in excess of the powers of the arbitrator, viz; determine the truth of the facts on whether there was an excess of authority. This duty can only be performed by ascertaining the true facts that were set before the arbitrator. Requests for relief in arbitration are made on a motion, but that does not mean that issues of fact of what was before the arbitrator are decided summarily on the motion. If an issue appears on the motion, that is valid, it should be subjected to the trial process. This is so not

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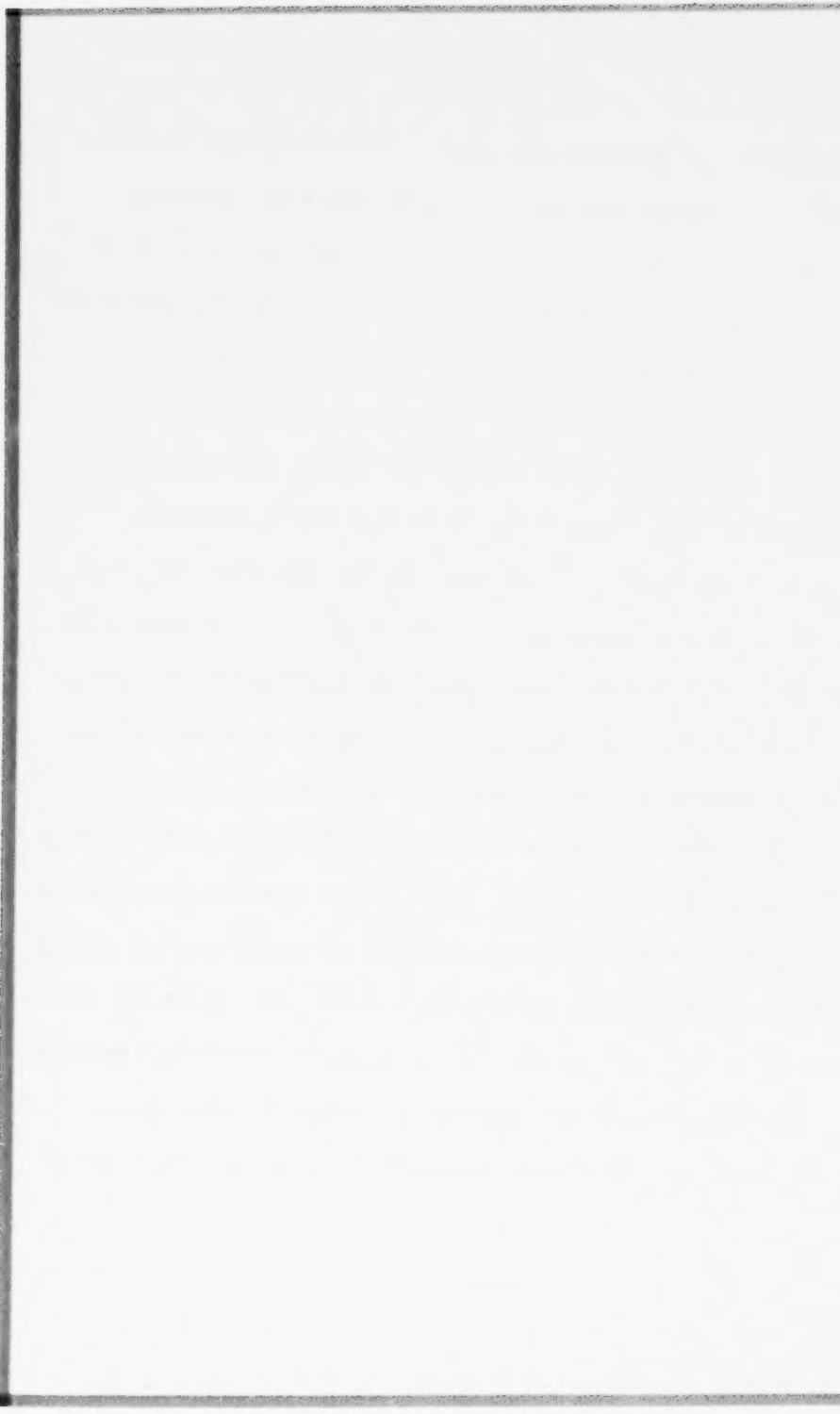
because there is a specific provision of the Arbitration Act that says so but because the due process clause of the Constitution requires due process - a trial. An issue of fact appearing on a motion which is dispositive of the whole case has been held to require a trial to meet the demands of Constitutional due process; see Silver v. New York Stock Exchange, 373 U.S. 341, 361-366; Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 305, 306; and dissenting op. in I/S Stavborg v. National Metal Converters, Inc., 500 F. (2) 424 (2 C.A. 1974); Commercial Iron and Metal Co. v. Bache & Co. Inc., 478 F. (2) 39; and Sartor v. Arkansas Natural Gas Co., 321 U.S. 620, 624.

While Silver and Ricci dealt with an esoteric problem of the stock and commodity exchanges, nevertheless, when it appeared upon analysis that factual issues were invloved this court did not hesitate to return the cases to the trial court to hold a trial to determine them. In the Stavborg and Commercial Iron cases arbitration agreements were under con-

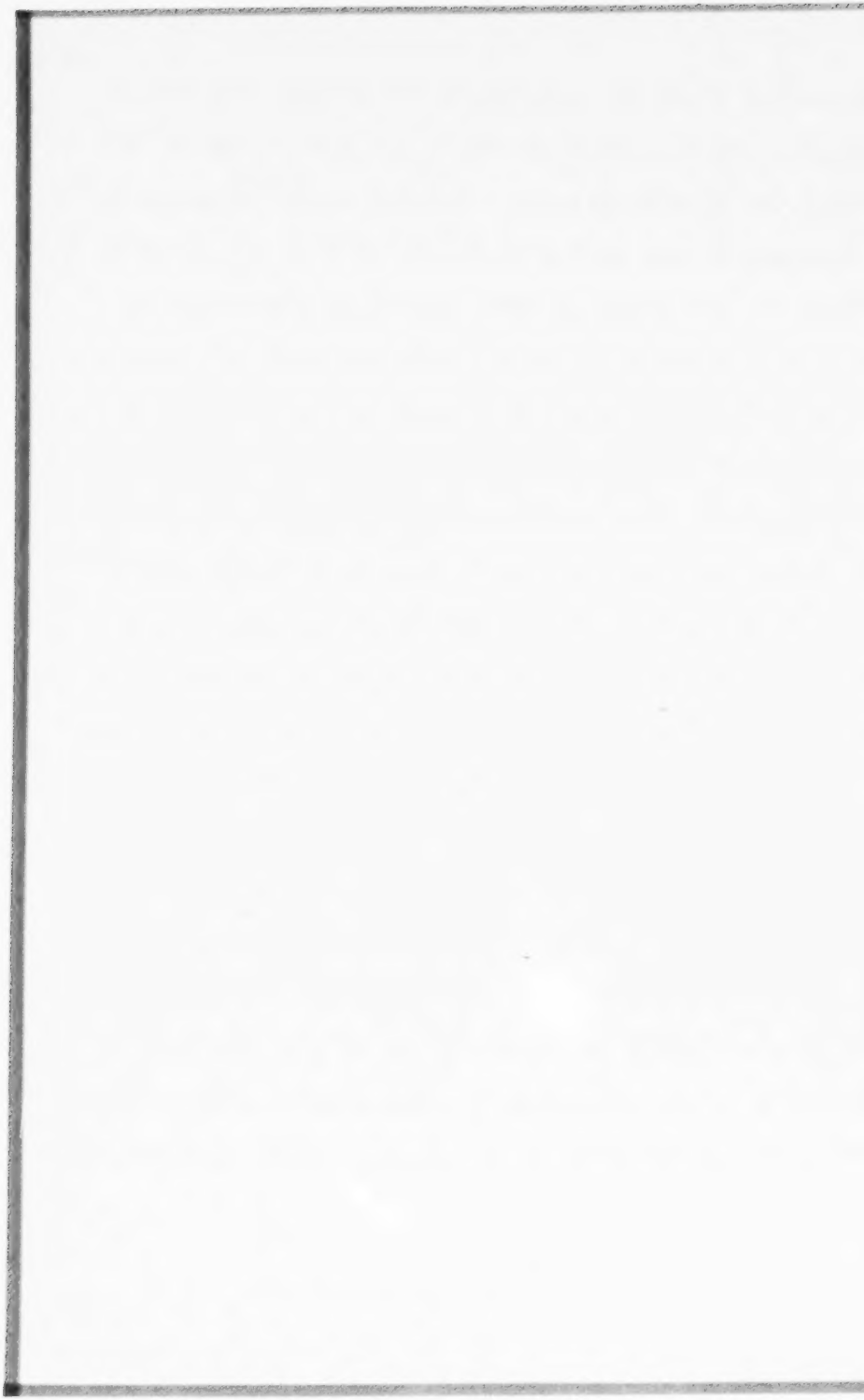
sideration and both courts were concious of the necessity of submitting fact issues to the test of a trial. Judge Mansefield's dissenting opinion voiced the same view voiced by Zack, and which so far has not been heard, viz; that where an issue of fact appears on a motion to vacate an award, under the Arbitration Act, if issues are presented they should be tried. Not to do so Judge Mansefield said at p. 433 "would be to deny due process". In fact, in the case before Judge Mansefield, the facts were in writing and clearly unambiguous, yet the district court had affirmed the award by arbitrators which had disregarded them in favor of liability against the defendant by preferring to recognize conflicting principles such as the policy of arbitration is speed, and that arbitrator's fact findings and conclusions of law are not reviewable. The Court of Appeals majority affirmed calling the complaint of the appellant one that the arbitrators had misconstrued the contract, despite the plain fact that the contract expressly said no liability



whereas, the arbitrators said liability. Judge Mansefield could not accept the fact finding because it was clearly erroneous. Also, this court said in Perry v. Sinderman, 408 U.S. 593, at p. 598 "that there is a genuine dispute as to whether the college refused to review the contract on an impermissible basis as a reprisal for the exercise of Constitutionally protected rights". This court was distinctly motivated in Perry to subject issues of fact regarding a claimed violation of a Constitutionally protected interest to a trial.

This raises the question for this court in this case, viz; is the principle that an arbitrator's fact findings and conclusions are not reviewable dispositive in a case where the losing party shows that he was deprived of due process. Wasn't petitioner deprived of due process when the conceded, admitted and uncontroverted facts are contradictory to the award if reason and the applicable law is applied to the award. In other words, what if the proof in the case shows facts proving conclusively

that there were no arbitrable disputes, may the arbitrator's decision awarding as though there was a dispute, lawfully made. Is the loser foreclosed from showing the facts in proof of his claim to an excess of authority by the rule that findings of fact and conclusions of law are for the arbitrators. Hardly! The two principles act on different planes. If the facts before the arbitrator show that there is a dispute, then the findings of the arbitrator are final, but if the facts show that there is no arbitrable dispute, the award must be void. But how does one get the district court to examine this question. If when the loser gets to the courthouse to assert his claim of an excess of power, how far must he go to raise the question to win his case. If the facts submitted are susceptible of only one conclusion, viz; of non-liability, would the loser not only be entitled to a vacation of the award but also wouldn't he be entitled to a dismissal of the arbitration altogether. Where it was clearly proven, as in this case, that there were no arbitrable



disputes to be settled, may a dismissal of the arbitration be in order. This latter is a lower court function, see Section 2, 3, 4, and 9 of the Arbitration Act. Whether there is an arbitrable dispute, is a threshhold question in every arbitration matter coming into the courts, see John Wiley & Sons, Inc. v. Livingstone, 376 U.S. 543. This case distinguishes matters that are for the courts from matters that are for the arbitrators. It relies upon this court's trilogy of United Steel Workers cases, appearing at 363 U.S. 564, 574, and 593. In the case at bar, the threshhold question was not raised before the hearing, but it was raised at the hearing and later in the court in moving to vacate the award.

While Section 6 of the Arbitration Act provides that applications in arbitration matters may be made by motion, it by the same token, does not say that all determinations of facts on motions in arbitration matters shall be decided forthwith on the papers. That would deny the trial process to a

litigant submitting an issue of fact. A commercial arbitration is a substitute for a trial. So said this court in the United Steel Workers cases, supra. Besides Rule 81 (a) (3) F.R.C.P. expressly makes the Federal Rules of Civil Practice applicable to proceedings under the Arbitration Act. Also, this court has said in New Hampshire Ins. Co. v. Scanlon, 362 U.S. 404, that the Federal Rules of Civil Procedure apply to all forms of civil actions. Consequently, a trial would be necessary if a litigant's rights depends upon a fact issue, even in cases where the rights are asserted under the Arbitration Act. The Rules also provide for motions for Summary Judgments but they are not granted where an issue of fact is raised; then a trial must be had. Two earlier Court of Appeals cases have held that on motions to confirm or to vacate, if issues of fact appear, those issues should be referred to a trial, see Hyman v. Pottberg's Ex'rs, 101 F. (2) 262 (L. Hand J.) and Campbell v. American Fabrics Co., 166 F. (2) 959. Both these cases are Second Circuit

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cases. Judge Frank in the Campbell case analyzed the problem as is being attempted here. He compared the award to the agreement under which the arbitrator had acted and found that the award had not followed the agreement and remanded the case to the trial court to determine the fact issue (the arbitrator had meanwhile died.)

This court has, time and again, said that if the arbitrator's award does not follow the agreement of arbitration, the award is in excess of authority and cannot stand. It used the words "manifestly disregards" the powers under the agreement in Wilko v. Swan, 346 U.S. 427, which only means the same thing. Mr. Justice Frankfurter while dissenting in Wilko v. Swan, because he would trust arbitrators to apply the Securities Act properly, also said that if they didn't, that the loser had his remedies under Section 10 of the Arbitration Act. This court in the aforementioned trilogy of United Steel Workers cases said at p. 478 that commercial arbitration is a substitute for a trial and is different from

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arbitration in labor disputes. At 568, this court said that in commercial disputes, the arbitrator must look to the contract appointing him for the delegation of his power to determine the dispute. At page 595, this court said of an award in labor disputes.

> "Nevertheless an arbitrator is confined to interpretations and applications of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources. Yet, his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Thus this court has affirmed that the agreement, the source of the agreement to arbitrate, determines the arbitrability of the dispute. If disputes arise outside the agreement, there has been no agreement to arbitrate them. This should hold true to situations where arbitration is being sought and objected to (threshhold), and to situations where

arbitration has been had but the award is being attacked because they can only rest upon facts falling outside the scope of the agreement. Here, there has been no suggestion by Intsel that Zack submitted the facts outside the agreement to the arbitrator for the latter's decision. It is saying only that the award was made on the basis of the contract of the parties. The conceded facts show that the contract was "unmade", terminated, and revoked. Hence, there were no disputes under the prior contract. The arbitrator should have recognized the fact but as he didn't, the award was an excess of authority. But, the Court of Appeals has affirmed a refusal by the district court to look at the facts.

This court has not had occasion to restate the principles of Wilko and of the United Steel Workers cases insofar as to compare the award to the contract terms is concerned. In U,S. Bulk Carriers v. Arguello, 400 U.S. 351, at p. 362, Mr. Justice Harlan had occasion to assert that the judicial inquiry in matters of contract rights is limited by the arbi-

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trability of the dispute (in a threshhold case). Here, again, the supremacy of the contract rights over all other rights in arbitration is affirmed. In Atkinson v. Sinclair Refining Co., 370 U.S. 238, this court said that the facts of the alleged dispute will declare whether the dispute is within or without the scope of the arbitration agreement. And in Howard Johnson Co. v. Hotel Employees, etc., 417 U.S. 249 and in N.L.R.B. v. Burnes, 406 U.S. 272, this court said that Howard Johnson Co. was not a party to the labor agreement while in Burnes, this court said that Burnes did succeed to the obligations of the contract. These cases only show once more that the facts of the actions of the parties and the terms of the contract are of paramount consideration for the court to find or not, liability, and an arbitrable dispute. An arbitrator's power to find facts and to make conclusions of law stems only from this paramount fact that there is a contract existing that defines arbitrable disputes and the facts of the case show that there is a dispute with

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reference to the contract terms or its performance.

The Court of Appeals, Third Circuit has followed this court's decision in Wilko and the United Steel Workers trilogy in Swift Industries Inc. v. Botany, 466 F. (2) 1125; in Ludwig Honold Mfg. Co. v. Fletcher 405 F. (2) 1123; and in H.K. Porter Co. v. United Saw, File and Steel Prod. Wkrs., 333 F. (2) 596. At p. 602 the Court of Appeals in H.K. Porter Co., compares the facts of the agreement to the award and found it partly in accordance with agreement and partly outside the scope of the agreement and for that reason it affirmed in part and reversed in the latter part, saying for the part reversed that the arbitrator "had no ground upon which to base his interpretation of the clear and unambiguous words of the eligiblity clause". Here the inquiry into the facts was made just as this court in the United Steel Workers cases had intimated that it should be made. This court has never expressly stated that the inquiry into the facts should be made. As it is, the Second Circuit has recently gone so far

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afield as to support awards by labelling them contract construction even though, that construction was peculiar and defied ordinary logic. There is the case of I/S Stavborg v. National Metal Fabrications Inc., supra, and there is Parsons & Whittemore Overseas Co. Inc. v. Societe G. de L. Du.P. (R), 508 F. (2) 969. In the latter case, the strong language of the court under the headings of "arbitration in excess of jurisdiction" and award in "Manifest Disregard" of the law, would imply that the principle that an arbitrator may not be second-guessed on his interpretation of the contract, goes so far as to permit an arbitrator to determine the extent of his own power to interpret. The matter cannot go to arbitration until there is a dispute that is arbitrable. To give an arbitrator the right to define whether the dispute is arbitrable is directly in conflict with American notions of due process and fair trial and in conflict with the decisions of this court mentioned above, and of the

courts in the Third Circuit, and even of the Arbitration Act. That Parsons considers an award under the International Convention does not detract from the unlawful incursion upon our constitutionally protected right to due process. See Hilton v. Gujot, 159 U.S. 113. Though this famous case discusses conflict of laws on whether a foreign judgment may be enforced, it discusses the court procedures of France and states that they did not comport with American notions of due process. Arbitration where the arbitrator uses the power to determine if an issue exists where that power has not been agreed upon by the parties is similarly un-constitutional.

Also, in Sobel v. Hertz, 469 F. (2) 1211, Judge Feinberg of the Second Circuit sent the case back to the district court to determine if issues of fact appeared in the record of proceedings before the arbitrator, when the district court would have required a separate clarification of the arbitrator's intentions. Why? What is wrong with an inquiry into the truth of the matter? This case also shows the

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preference of the Second Circuit for the principle of ending inquiries with arbitration awards. The decisions of the Second Circuit put form above substance, a thing wholly out of place these days. Yet, Section 10 (d) of the Arbitration Act states there is a check upon arbitrary decisions of arbitrators violating the rule of impartiality and due process of law. It states that an award may be vacated if it is an excess of power.

This court in Prima Paint v. Flood & Conklin, 388 U.S. 395 did limit the threshhold question by finding a distinction between fraud in the making of the whole contract and fraud in the making of the arbitration clause. Why? When fraud is supposed to vitiate the whole agreement is discussed by Mr. Justice Black in the dissenting opinion. Nevertheless, the decision of the majority does not touch the question here because the fraud claimed by Zack is lodged in the making of an award on legally terminated contracts, and, on a writing that was not even the agreement of the petitioner.

An interesting case in support of petitioner's position is the Seventh Circuit case of Halcon International Inc. v. Montsanto Australia Ltd., 446 F. (2) 152, where at p. 157, it states that Section 2 of the Arbitration Act which states "A written provision * * * to settle by arbitration * * * shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.", must be read with the word "making" in Section 4 and means termination as well as recision. Accordingly, the requirement of a trial where an issue is raised as to the making and performance of the contract as provided in Section 4, could be read to include the claim of a loser under Section 10 (d) of the Act, giving him the right to a vacation of an award which is in excess of authority. As a help to this court, the following statements of the arbitration clause is made:

"9. Any controversy arising under or in relation to this contract or any modification thereof

shall be settled by arbitration in the City of New York * * *." Respondent's exhibit A p. 7a. Petitioner would like to point out that the clause does not give the arbitrator the power to consider whether to "unmake" or to terminate or revoke the agreement. Even if the uncontroverted facts of a termination could be said to raise an issue of fact, a trial should be had to show that this uncontroverted proof of termination put an end to the contracts to be arbitrated. A clear case in support is Judge Thacher's decision in Worcester Silk Mills Inc., 50 F. (2) 966.

It seems from a reading of the affirming decisions of the Court of Appeals that instead of "discovering" the facts and the law that they resort rather to rationalizing decisions of the district courts. In some cases the rationalization goes so far as to lose sight of the judicial duty to find the truth. There is no need to do this for again, this court has decreed in Kotteakos v. United States, 328 U.S. 750; and Chapman v. California, 386 U.S. 18; c/f Harmless Error Rule, (1967) 20

Stan. L.R. 83, 98, that the harmless error rule is to be applied to do substantial justice and where the decision under review contains an error of law or an incursion of a Congressional Act or of a Constitutional provision, reversal, nevertheless, must be decreed. This rule rather required an examination and a "discovery" of the facts and of the applicable law, not a rationalization of the district court's reasons for its decision. Such practice of making rationalizations could lead to a second error by the Court of Appeals. The whole judicial process is adversely affected. The functions of the Court of Appeals as an Appellate Court to discover errors is frustrated. Litigants are incensed and aggrieved and cry out to this court. Thereby the load of a nations aggrieved cases is thrown upon this court which is already burdened and overworked and is inclined not to hear appeals unless it can help illuminate the path of the courts below. This court has become the work horse for

justice instead of being its supervisor. Yet, Congress has ordered the district court and the Court of Appeals, one to try, and the other to hear appeals, one to determine and the other to check. A restatement of the harmless error rule with emphasize upon when to reverse would probably cause a re-examination of the unjust application of the rule that a Court of Appeals should be reluctant to reverse. Both trial courts and the Court of Appeals are subject to that rule. So, why, should the Court of Appeals be reluctant to reverse. They should not be reluctant to examine facts so that the truth is found.

APPLICABILITY OF NEW YORK LAW

Clause 8 of the same exhibit A reads: "This agreement shall be construed in accordance with the Laws of the State of New York." This clause rules the parties' responsibilities under the contract. Accordingly, the arbitrator was bound by New York law. Positively he was not to dispense his own brand of New York law, but he must acknowledge

the legal fact which is New York law, see In the Matter of In't Assoc. of Mechinists (Cutter-Hammer, Inc.), 271 App. Div. 917.

New York law states that where the undisputed evidence of a party is reasonable and fair, it is binding and conclusive upon the parties and the Court; see Hull v. Littauer, 162 N.Y. 569 and Woodson v. New York City Housing Authority, 10 N.Y. (2) 30. Admitted or conceded evidence is without question binding upon the court, see Matter of Term. Auxiliary Maritime (Winkler), 6 N.Y.(2)/294, 300; Matter of Int's Machinists (Cutter-Hammer) supra. A form of admission is where one party testifies to a fact implicating his adversary and the adversary fails to refute it. Whether it is called an admission or failure to carry forward the burden of persuasion (see McCormick on Evidence, Chapter 36; and Richardson on Evidence, 8th Ed., Sections 299, 300) the result is the same. Proof of a fact is made. Such proof is binding upon the parties. See also, Young Foundation Corp. v. A.E. Ottaviano, Inc., 29

M. (2) 302, aff'd 15 A.D. (2) 517; and Skibicki v. Diesel Construction Co., 56 M. (2) 955, aff'd 29 A.D. (2) 1050.

Mr. Zack's testimony of the revocation or novation agreement putting an end to the written contracts and Mr. Krasnov's testimony of the cancellation of the same contracts when there could no longer be a delivery in September at Detroit are undisputed and remain uncontroverted. The offer of late delivery late in November is proven by respondent's own letter of November 19, sending the shipping documents (see Zack's exhibit 7 p. 101). The lack of performance of the contract by the seller is a fact that could not be disputed and it remains clear that delivery was attempted in November whereas the contract called for September delivery and there are no documents proving modification.

The writings starting with Zack's purchase order of January 7, 1969 are found in the appendix

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as follows:

	Page
Zack's purchase order of 40,000 lbs. dated 1/7/69	76,77
Intsel's confirmation of purchase to Zack, dated 1/13/69	*
Intsel's confirmation of reduction of the sale to 10,000 lbs. dated 3/14/69	115
Zack's purchase order of 55,000 lbs. dated 6/10/69	50
Intsel's confirmation of sale to Zack of 55,000 lbs. dated 6/23/69	51
Zack's purchase order of 10,000 lbs. dated 7/29/69	52
Intsel's confirmation of sale of 10,000 lbs. dated 8/7/69	100

* This document was never introduced into evidence before the arbitrator but the parties stipulated that it was the same as the confirmation which is the exhibit found at p. 51 insofar as the printed provisions are concerned. The description of the goods in this confirmation follow the description in Zack's purchase order which is found at pp. 76,77.

The foregoing uncontroverted testimony together with the documents mentioned which are either documents originating with Intsel or were offered by Intsel according to New York law was binding proof

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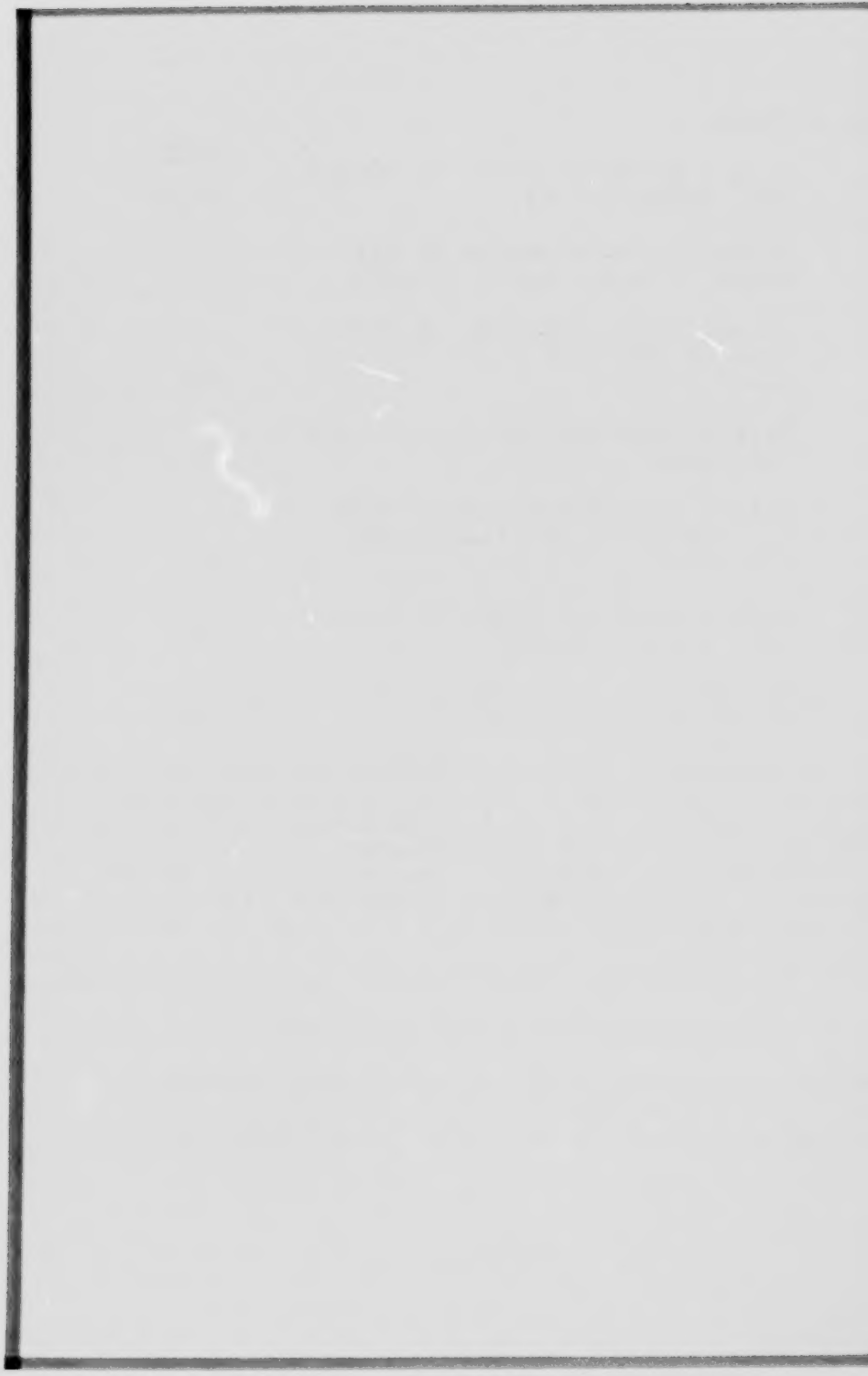

of the facts evidenced by them. They were before the arbitrator and constituted the record of proceedings before the arbitrator. Zack, consequently, claimed that the sales were cancelled and revoked and there was no obligation on the part of Zack to pay for the goods. The delivery of the goods to Zack, pursuant to the novation agreement was of no concern to the arbitrator. That fell without the scope of the cancelled agreement. Hence, the award finding an obligation upon the part of Zack was in excess of the arbitrator's authority.

Also, New York law as to when an arbitrator oversteps the bounds of the agreement of the parties is not much different than federal law.

Article 75 of New York's Civil Law and Practice, Section 7511(b) (1) (iii) states that an award may be vacated when "an arbitrator * * * has exceeded his power". This claim of excess of authority need not be advanced at the "threshhold". It is permitted by the Uniform Arbitration Act and by Section

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7511 N.Y. C.P.L.R., to be raised on a claim to vacature by an excess of power, see the comment in 58 Northwestern U. Law Rev. p. 523. The Federal Arbitration Act also gives award losers the right to claim a vacature if the arbitrator had exceeded his powers. Courts can afford to be liberal with arbitrability in favor of arbitration as a threshhold question; but where an arbitrator had illogically decided against the facts and the law, due process requirements are not met and the award should be vacated. Where there are no disputes under the contracts calling for arbitration, there is nothing to arbitrate, Alpert v. Admiration Knitwear Co., 304 N.Y. 1; and Matter of General Electric Co. (Electrical Workers) 300 N.Y. 262. An oral contract rescinding a prior written sales agreement validly creates a new relationship between the parties respecting the goods, Nassoit v. Tomlinson, 148 N.Y. 326; Reichel v. Standard, 225 App. Div. 628, aff'd 254 N.Y. 86; Bandman v. Finn, 185 N.Y. 508; Stone v. Beim, 176 N.Y.S. 25, 26, (not officially reported),

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U.C.C. 2.601; 2.602; and 2.604.

New York courts have refused to uphold awards which are in excess of the arbitrator's power by saying that the award is completely irrational when it makes a completely new contract for the parties. This was announced by Chief-judge Fuld in In the Matter of National Cash Register Co. (Wilson), 8 N.Y. (2) 377 citing this court's United Steel Worker cases as his guide to that expression. The waiver question in that case is not present in this case. See also, W.M. Gervain v. Robilotto, 40 A.D. (2) 1060 where the award was called "irrational". Also, Glenwood Jewish Center v. Marad Caterers, 39 A.D. (2) 536; and In the Matter of the Arbitration between Vincent J. Smith, Inc. and B.W. Lauri Trucking, Inc., 19 A.D. (2) 763, followed Chief Judge Fuld in holding that the awards were "completely irrational" according to the plainly stated contract terms.

WHEREFORE it is respectfully prayed that this court recognize that petitioner has been denied

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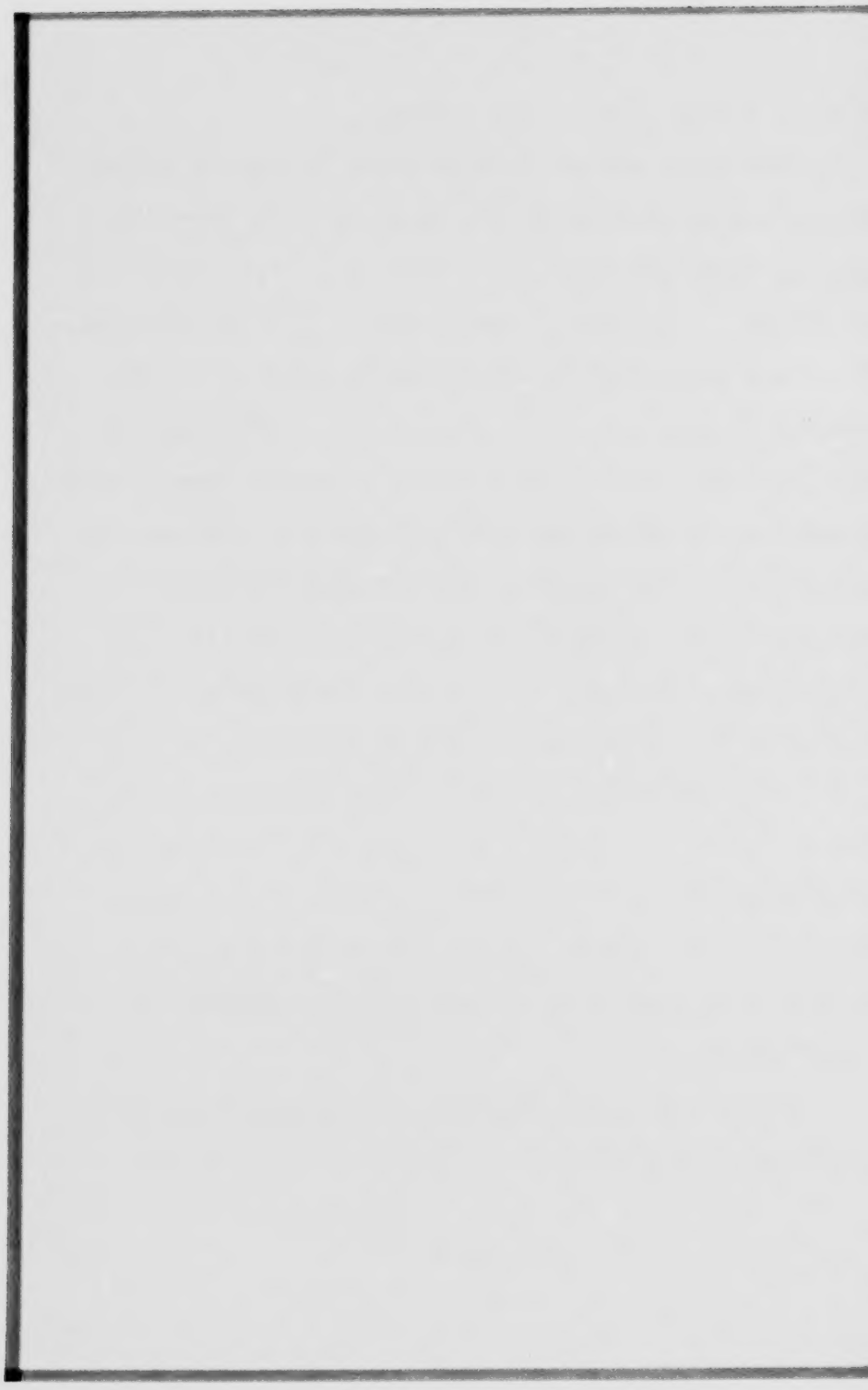

due process in the manner in which the arbitrator and the courts below have avoided their duty to consider the proof of the facts and if it agrees with the petitioner that it has under that proof made clear that Zack has no obligation to pay for the goods, that it reverses the Court of Appeals and remand the matter to have a judgment of dismissal of the arbitration entered against the respondent or if that proof is not that clear, to direct the trial court to hold a trial on the issues raised by petitioner's facts, or if this court decides to make a more general ruling upon the future course in the courts of proceedings such as these, then it can grant a writ of certiorari to the Court of Appeals to review the whole question.

Respectfully submitted

Robert W. Cauldwell

ROBERT W. CAULDWELL

ANTHONY B. CATALDO

Attorneys for petitioner

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

In the Matter of the Arbitration
Between

INTSEL CORPORATION,

Petitioner,

and

M.W. ZACK METAL COMPANY,

Respondent.

- X

APPEARANCES

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Attorneys for Petitioner
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JOSEPH WEISS
Of Counsel

ANTHONY B. CATALDO
New York, N.Y.
Attorney for Repondent

GURFEIN, D.J.:

The petition for confirmation of an arbitration award has been unnecessarily transformed from the ordinarily perfunctory to the complicated by respondent's motion to

dismiss the petition for failure to state a claim and because of charges of alleged misconduct on the part of the arbitrator.

The petitioner Intsel Corporation ("Intsel") is a New York corporation with its principal place of business in New York. Intsel is a commission broker and is part of a group of companies located in France called Pechiney. Intsel sells to United States customers metal objects which are fabricated to specification at a mill in France. In this case the customer was the respondent M.W. Zack Metal Co. ("Zack") and the mill was Cedegur.

Zack is a Michigan corporation with its principal place of business in Michigan. It is a dealer in non-ferrous scrap and new metals which purchases metal objects on behalf of customers with specified needs. In the instant case Zack made its purchases from Intsel on behalf of Fox Manufacturing Co. ("Fox"), a Detroit firm.

Intsel alleges that Zack has breached two contracts for the purchase of various metal tubings in interstate commerce. The contracts are numbered 50240

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and 50617. Each contract consists of several written documents; but the arbitration clause in contract 50240 is contained in a document dated January 13, 1969 (Ex. A to Petition) and the arbitration clause in contract 50617 is contained in a document dated August 7, 1969 (Ex. B to Petition). The clause in each instance is identical, and reads as follows:

> "Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on the award may be entered in any court, State or Federal, having jurisdiction."

The arbitrator agreed with Intsel's claim that Zack had breached the contracts and awarded the petitioner $35,253.60 together with interest at 6% from January 1, 1970 to date of payment plus fees in the amount of $702.53. Intsel has demanded payment of the award, and Zack has refused. Intsel now seeks confirmation of the arbitrator's award plus interest from date of judgment, together with the costs of this proceeding. Respondent has cross-moved for dismissal of the petition and for vacation of the award.

Since the respondent's jurisdictional claims are frivolous and the charges of misconduct unfounded, the arbitrator's award is confirmed and costs allowed.

1) Jurisdictional Claims

Zack claims there is no subject matter jurisdiction and no personal jurisdiction. It asserts that there is improper venue and that there is a failure to state a claim.

The Court has subject matter jurisdiction since there is diversity jurisdiction, 28 U.S.C. § 1332, and since the contract in issue evidences a transaction involving commerce, 9 U.S.C. § 2. Ballantine Books Inc. v. Capital Distributing Co., 302 F.2d 17, 19 (2 Cir. 1962); Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1269, 1275-76 (2 Cir. 1971).

9 U.S.C. § 9 sanctions the service here made upon Zack in Detroit by the United States Marshal, even if respondent were not deemed to have waived that objection. Venue is also proper here. The submission to

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arbitration in New York in itself waives any objection to venue. Farr & Co. v. CIA Intercontinental, 243 F.2d 342 (2 Cir. 1957). Reed & Martin, supra. Finally, the relief which the petitioner seeks is confirmation of an arbitration award. 9 U.S.C. § 9.

2) Claims of Arbitrator's Misconduct

Zack alternatively moves to vacate the award because:

> "a). the same was procured by corruption, fraud or undue means;
>
> b). the arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, in relying upon incompetent and unlawful evidence, and was guilty of other misbehavior by which the rights of the respondent were prejudiced; and
>
> c). where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The District Court's function in confirming or vacating an award is "severely limited." Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805, 808 (2 Cir. 1960). "If it were

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otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated." (Id.) The scope of inquiry extends only "to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in § 10 of the Arbitration Act." Saxis Steamship Co. v. Multifact International Traders, Inc., 375 F.2d 577, 581 (2 Cir. 1967). And the burden of proof, in respect to claims arising under the provisions of § 10, rests with Zack. (375 F.2d at 582)

(a) Zack alleges that the award was procured by "corruption, fraud or undue means." 9 U.S.C. § 10(a). Although this point is not separately briefed, apparently it refers to Eugene M. Zack's affidavit wherein it is charged that the respondent was not given an opportunity to name an arbitrator (at p. 2). According to the unrefuted statements of John M. Schwartz's affidavit (attorney for petitioner), Zack's claim is patently untrue. Zack was properly notified of Intsel's intention to commence arbitration proceedings by service of a Demand for Arbitration which had been filed with the New York Office of the American Arbitration Association ("AAA"). Mr. Schwartz avers that on May 9 the AAA forwarded to both sides a list

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of names selected from its panel of arbitrators. "Both parties were asked to cross out the names of any proposed arbitrators that were unacceptable, to mark the remaining names in order of preference." Mr. Schwartz designated Mark A. Buckstein his fifth choice, out of six possible names. On May 30, 1973 the AAA sent Zack's attorney a letter indicating that if Zack did not return the list of arbitrators by June 6, 1973 all names would be deemed acceptable. Evidently no objection was ever made and on June 18 the AAA advised both parties that Mr. Buckstein had been appointed as arbitrator. Copies of these letters from the AAA are attached as exhibits to Mr. Schwartz's reply affidavit.

This procedure was proper.

(b) Zack charges misconduct on the part of the arbitrator in refusing to hear pertinent evidence, relying on unlawful evidence and for other misbehavior. 9 U.S.C. § 10(c).

The specific evidence allegedly refused is the testimony of a Mr. Krasnov, Zack's New York representative "that Zack was a broker, a middle man, and

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that he placed his cancellation of the June and July written contracts upon the necessities of the case [because Zack's customer, Fox, needed the material by September in order to fulfill a Government contract, and] Intsel's manifest breach of the writing in failing to deliver as agreed." (Cataldo Affd. at 10). Mr. Zack's own affidavit contradicts the assertion that the arbitrator refused Krasnov's testimony on this point. "Also, Mr. Krasnov testified before the arbitrator that he had cancelled the contract with Intsel for the latter's failure to deliver on the agreed date."

The fact that the arbitrator did not credit this testimony is not reviewable since the arbitrator's award is conclusive as to issues of fact. See Oinoussian Steamship Corp. of Panama v. Sabre Shipping Corp., 224 F. Supp. 807 (S.D.N.Y. 1963). And the issue of whether the contract had been terminated is for the arbitrator to decide. Eastern Marine Corporation v. Fukaya Trading Co., 364 F.2d 80, 85 (5 Cir. 1966); Matter of Terminal Auxiliar Maritima, S.A., 6 N.Y.2d 294, 298 (1959).

Zack claims that Exhibit B was not offered in evidence and yet was relied on by the arbitrator in making

his award. That is not true. Exhibit B was introduced as Exhibit 6C.

Zack's claim that neither Exhibit A nor B to the petition were admissible at the hearing because they were not signed by the respondent is equally untenable. Fisser v. International Bank, 282 F.2d 231 (2 Cir. 1960); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013, 1019-20 (S.D.N.Y. 1971). The arbitrator may well have decided that the contract was between merchants and therefore did not require their signatures, U.C.C. § 2-201(2); or that even if the contracts did not meet the formal requirements of the statute, it was enforceable under the provisions of U.C.C. § 2-201(3)(b) because the respondent admitted the contract was made but contested only that it was not enforceable beyond the quantity of goods admitted; or, that it was enforceable under U.C.C. § 2-201(3)(c) because the goods had been accepted by the respondent. Under any of these interpretations, this Court would be bound by the arbitrator's conclusions even if it were erroneous. Oinoussian, supra; Burchell v. Marsh, 58 U.S. 344 (1854). Nor is there any need for the arbitrator to have explained his reasons for his decision. Burhardt v. Polygraph Co. of America,

350 U.S. 198, 203 (1956); Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2 Cir. 1972). In any event, the respondent concedes in his brief (p. 12) that "Petitioner issued a sales confirmation in writing accepting the order. The arbitration agreement appears as a printed clause on the back of the sales confirmation of sale."

(c) There is no basis for the charge that the arbitrator exceeded his power, no "manifest disregard" for the law having been demonstrated. See Amicizia Societa, supra, 274 F.2d at 808.

In his memorandum of law, the respondent levels a series of charges of bias, some of which have been dealt with already. Others concern admitting "obviously hearsay evidence, obviously perjurious statements [by petitioner's witness], and . . . badger[ing] the [respondent's] witness [Mr.] Krasnov [, Zack's N.Y. representative,] to the point where Krasnov got up and left during his testimony."

Mr. Schwartz, petitioner's attorney, who was present during these proceedings has sworn by affidavit that there was no indication of partiality by the arbitrator toward either side.

Respondent argues that there was a manifest exaggeration of damages and that this evidences partiality or bias on the part of the arbitrator. While it is true that the total selling price on the purchase contracts of January 13, 1969 and August 7, 1969 for a value of 50,000 pounds is only $24,760, the entire contracts as amended show sales of 70,000 pounds. (And see Respondent's Brief p. 13). The total arrived at by the arbitrator thus conforms with the amended contract. The reference in his award to January 13, 1969 and August 7, 1969 is merely a reference to the "Arbitration Agreements entered into by the above-named parties."

The admission of hearsay at the hearing is of no import, since technical rules of evidence need not be followed at an arbitration hearing. Burchell v. Marsh, supra, 58 U.S. at 352. While perjury may constitute fraud, the respondent points to no specific testimony which is palpably perjurious. Finally Mr. Zack's own affidavit demonstrates that the arbitrator's alleged bias was hardly the cause of Mr. Krasnov's departure from the witness stand. Krasnov, seeing things were going against him,

ran to avoid further questioning.

The award is confirmed. Costs to petitioner.

It is so ordered.

May 9, 1974

[redacted]

U.S.D.J.

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APPENDIX B

United States Court of Appeals

FOR THE

SECOND CIRCUIT

74-2255

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of March one thousand nine hundred and seventy-five

Present:

HONORABLE J. EDWARD LUMBARD
HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG

App. "B"

Circuit Judges.

In the Matter of the Arbitration between
INTSEL CORPORATION,

Petitioner-Appellee,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Appellant.

No. 74-2255

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Gurfein dated May 9, 1974.

J. Edward Lumbard

Leonard P. Moore

Wilfred Feinberg

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APP. C

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May , one thousand nine hundred and seventy-five.

Present: HON. J. EDWARD LUMBARD,

HON. LEONARD P. MOORE,

HON. WILFRED FEINBERG

Circuit Judges.

APP C

In the Matter of the Arbitration between
Intsel Corporation,
Petitioner-Appellee,

v.

M.W. Zack Metal Company,
Respondent-Appellant.

74-2255

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro

A. Daniel Fusaro
Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the SEVENTH day of MAY, one thousand nine hundred and seventy-~~XXXX~~-five.

In the Matter of the Arbitration between
Intael Corporation,

Petitioner-Appellee,

v. 74-2255

M.W. Zack Metal Company,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge
IRVING R. KAUFMAN

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-197

In the Matter of the Arbitration between

INTSEL CORPORATION,

Petitioner-Respondent,

and

M. W. ZACK METAL COMPANY,

Respondent-Petitioner.

PETITIONER-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF SUMMARY REVERSAL OR OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-197

In the Matter of the Arbitration between

INTSEL CORPORATION,

Petitioner-Respondent,

and

M. W. ZACK METAL COMPANY,

Respondent-Petitioner.

PETITIONER-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF SUMMARY REVERSAL OR OF CERTIORARI

This brief is submitted on behalf of Petitioner-Respondent, Intsel Corporation ("Intsel"), in opposition to the petition of Respondent-Petitioner, M. W. Zack Metal Company ("Zack"), for a writ of summary reversal or of certiorari to review a unanimous judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 13, 1975.

FILED THROUGH

Opinion Below

The opinion of the District Court, Southern District of New York (Gurfein, J.), annexed to the petition herein as Appendix A, was not officially reported.

The order of the Second Circuit Court of Appeals (Lumbard, Moore and Feinberg, JJ.), unanimously affirming without opinion the judgment of the District Court, is annexed to the petition as Appendix B. The orders of the Court of Appeals denying a rehearing and a rehearing *en banc* are annexed to the petition as Appendix C.

Statutes and Rules Involved

9 U.S.C. §§9, 10, 11

"§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdic-

tion of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not

expired the court may, in its discretion, direct a rehearing by the arbitrators.

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

Comercial Arbitration Rules of the American Arbitration Association §§22, 30 and 42

"*Section 22.* STENOGRAPHIC RECORD—The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 49.

Section 30. EVIDENCE—The parties may offer such evidence as they desire and shall produce such additional evi-

dence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent in default or has waived his right to be present.

Section 42. SCOPE OF AWARD—The Arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in his award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA."

Questions Presented

1. Did the District Court err in confirming an arbitration award where no showing was made of the existence of any of the grounds for vacating or modifying an award listed in 9 U.S.C. §§10 and 11?

2. Where contracts of sale provide for arbitration of any controversy arising under or relating to the contracts or any modification thereof, and the parties thereto proceed to arbitration before an arbitrator duly selected pursuant to

the Rules of the American Arbitration Association, and the arbitrator's award could rationally have been based on the contracts presented to him, did the arbitrator exceed his powers within the meaning of 9 U.S.C. §10(d) in that he apparently resolved issues of fact in favor of the successful party?

3. Did the District Court err in confirming an arbitration award where the arbitrator conducted a hearing pursuant to the rules of the American Arbitration Association, at which both parties were accorded the opportunity to present evidence and argument, and rendered an award precisely based upon the quantity of goods actually shipped pursuant to the contracts, and where his conduct of the hearing was wholly consistent with the standard of informality and expedition appropriate to arbitration proceedings?

Statement of the Case

Zack petitions herein for review of the unanimous judgment of the United States Court of Appeals affirming the decision and order of the United States District Court for the Southern District of New York (Murray I. Gurfein, J.). That decision granted the application of Intsel for confirmation of an arbitration award and denied Zack's motion to vacate said award.

Intsel commenced this proceeding in the United States District Court for the Southern District of New York pursuant to 9 U.S.C. §9 by the filing and service of its Notice of Application and Petition to confirm an arbitration award duly rendered pursuant to the Rules of the American Arbitration Association (hereinafter referred to as "the

AAA") (A. 1-9).* Federal jurisdiction was based upon the provisions of the arbitration agreement between the parties and their diversity of citizenship. Zack opposed the application and moved to dismiss the petition, claiming lack of jurisdiction, improper venue, insufficiency of process and failure to state a claim upon which relief could be granted; it also moved to vacate the award on the purported grounds that the award was procured by corruption, fraud, or undue means, that the arbitrator was guilty of misconduct and that the arbitrator had exceeded his powers (A. 10-11).

The District Court (Gurfein, J.) rendered its opinion and order confirming the arbitration award and denying Zack's motion in all respects, and judgment has been entered upon said order. Zack's motion for reargument was granted by Judge Gurfein and, upon reconsideration, the Court adhered to its original decision (A. ii).

The Court of Appeals for the Second Circuit (Lumbard, Moore and Feinberg, JJ.) unanimously affirmed, without opinion, the decision of the District Court. Zack's petitions for a rehearing and a rehearing *en banc* were denied.

On this appeal, Zack seeks a writ of summary reversal or of certiorari to review the decision and judgment below. It apparently bases its argument on alleged due process grounds, claiming that it was entitled to a retrial in the courts below of the facts considered by the arbitrator.

The objections to jurisdiction and venue, which Zack asserted in the District Court, and which were rejected,

* Pages in the Appendix before the Court of Appeals are hereinafter referred to as "A.—."

have not been pressed here or before the Court of Appeals. Neither has Zack here pressed its other rejected claims of insufficiency of process and failure to state a claim upon which relief could be granted or its allegations that the award was procured by corruption, fraud, or undue means, or that the arbitrator was guilty of misconduct.

Statement of Facts

During 1969, Intsel, a New York corporation with its principal place of business in New York City, and Zack, a Michigan corporation with its principal place of business in Michigan, entered into two agreements, Intsel's contract numbers 50240 (A.7-7a) and 50617 (A8-8a), for the sale of certain aluminum tubing and rods by Intsel to Zack. Each agreement, and each subsequent amendment thereof, was confirmed by Intsel's written contract which contained the following identical clause:

> "Any controversy arising under or in relation to the contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on this award may be entered in any court, State or Federal, having jurisdiction." (A.7a, 8a)

Contract 50240 was originally made pursuant to Zack's purchase order 3908 dated January 7, 1969 (A.76-76a) and Intsel's sales contract 50240 dated January 13, 1969 (A.7-7a) and provided for the sale of 40,000 pounds of aluminum hollow bar (tubing) at $.503 per pound. It was subsequently amended, however, pursuant to Zack's written re-

quest dated June 18, 1969 (A.50) and Intsel's "Change Order IV" dated June 23, 1969 (A.51) to cover 55,000 pounds, of somewhat different specifications (A.64-66).

Contract 50617 was originally made pursuant to Zack's purchase order 3917 dated July 29, 1969 (A.52), as amended as to price by Zack's letter dated August 5, 1969 (A.77), and Intsel's contract 50617 dated August 7, 1969 (A.8-8a). It provided for the sale of 10,000 pounds of aluminum round rods at $.462 (changed to $.464) per pound. It was subsequently amended pursuant to Intsel's "Change Order I" dated September 9, 1969 (A.78) which modified the specifications but left all other terms and conditions unchanged (A.66-67).

Delivery was made of 60,553 pounds under contract 50240 and 10,335 pounds under contract 50617 (A.68-69). Zack accepted and retained the goods (A.68), but made no payment therefor.

A controversy having arisen under the contracts, as amended, Intsel duly served Zack with a written Demand for Arbitration dated April 12, 1973 (A.70), setting forth the nature and amount of the claim and containing the following notice:

> "PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time."

Zack did not apply to stay the arbitration, but promptly appeared in the arbitration proceeding by its counsel (A.59, 71). A proposed list of arbitrators was sent to both counsel by the AAA (A.72-72a), but Zack failed to designate its choices for arbitrator, even though given additional time to do so by the AAA (A.59-60, 74). Consequently, after due notice to both parties, the AAA selected an arbitrator from the list returned by Intsel (A.60, 75). The arbitrator thus chosen, Mark A. Buckstein, Esq. was Intsel's fifth choice out of six proposed arbitrators (A.59, 73).

Zack's New York counsel appeared before the arbitrator prior to the hearing date, but raised no objection to Mr. Buckstein's service (A.60). Thereafter, a hearing was held, at which both Zack and Intsel were represented by counsel and presented witnesses and documentary evidence (A.61, 63). No stenographic record was made of the hearing nor did Zack request that one be made pursuant to the rules of the AAA (A.61).

At the hearing, Zack argued, among other things, that one or both contracts had been "superseded" by their written amendments, that the contracts had been orally "cancelled" at the time of delivery and that Zack had accepted delivery "on Intsel's account." (A.46) Zack's factual assertions were vigorously disputed by Intsel and were contradicted by documentary evidence (A.68) (Zack's repeated assertions that its version of the facts was "conceded," "admitted," "not denied" or "not in dispute" before the arbitrator are incorrect).

Although not required by the Rules of the AAA to follow any particular procedure, the arbitrator permitted

both parties to present all their witnesses and to cross-examine those of the other side, permitted opening addresses and closing summations by counsel and occasionally questioned the witnesses himself for clarification (A.63). Thereafter, he made his award in writing (A.9), directing Zack to pay to Intsel $35,253.60, together with interest thereon at the rate of 6% from January 1, 1970 to the date of payment and, in addition, $702.53 for fees previously advanced by Intsel to the AAA. The award also denied all counterclaims of Zack (A.4-5, 9).

Summary of Argument

In a proceeding under the Federal Arbitration Act to confirm an arbitration award, the court must confirm the award unless the opposing party establishes the existence of one of the specific grounds for vacation or modification of the award prescribed in Sections 10 or 11 of the Act. The court's power to review arbitration awards is extremely limited and an arbitrator can only be held to have exceeded his powers under Section 10(d) of the Arbitration Act if the record before the District Court shows that the award manifestly disregarded the law or was completely irrational in terms of the submission to the arbitrator.

In the case at bar, the parties voluntarily agreed to submit to arbitration any controversy arising from the contract or any modification thereof. The arbitrators awarded damages to Intsel for the precise quantity and price of goods actually delivered pursuant to the latest contract between the parties. The award could rationally have been derived from the submission and was correctly

confirmed. Due process of law does not require that the issues already tried before the arbitrator be tried again in the District Court.

Reasons for Denying the Writ

The considerations set forth in this Court's rule governing review on certiorari, although not limiting the discretion of the Court, do support a denial of certiorari in this case (Rule 19.1(b)). We submit that none of the criteria set forth therein apply here. Indeed, not once in its overlong brief does Zack even refer to these guidelines. There is no conflict between the Second Circuit's decision in this case and any decision of any other court of appeals. There is no decision of an important state question which is in any way in conflict with applicable state law. There is no decision on an important question of federal law which has not been, but should be, settled by this Court. Nor has a federal question been decided in conflict with applicable decisions of this Court. We have here a decision of a court of appeals affirming a district court's confirmation of an arbitration award upon well established principles of law. As the District Court stated: "The petition for confirmation of an arbitration award has been unnecessarily transformed from the ordinarily perfunctory to the complicated by respondent's motion to dismiss the petition [to confirm] * * *" Although Zack has now limited his objection to the award to a claim under Section 10(d) of the Arbitration Act that the arbitrator "exceeded his powers," it has still made no showing sufficient to overturn it.

I

The arbitration award must be confirmed unless Zack has sustained its burden of showing that it is completely irrational.

A. An Arbitration Award May Not Be Attacked for Errors of Fact or Law.

Section 9 of the Arbitration Act, 9 U.S.C. §9, provides for application to the appropriate United States District Court for an order confirming an arbitration award where, as here, the agreement between the parties authorized the entry of judgment on the award and the application is made within one year after the award. It then provides that upon such application, "the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title" (Emphasis supplied).

As the Second Circuit Court of Appeals said in *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960) at page 808:

> "[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the ground of erroneous finding of fact or of misinterpretation of law."

Thus, an arbitration award should be upset by the courts only with great hesitation. *Karppinen* v. *Karl Kiefer Machine Co.*, 187 F.2d 32, 34 (2d Cir. 1971). As the merits of the controversy submitted to arbitration cannot be reopened before the court, the role of the courts "is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in §10 of the Arbitration Act * * *." *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577, 581 (2d Cir. 1967); *Catz American Co.* v. *Pearl Grange Fruit Exchange, Inc.*, 292 F.Supp. 549, 551 (S.D.N.Y. 1968).

As Judge Weinfeld said in *Oinoussian Steamship Corp. of Panama* v. *Sabre Shipping Corp.*, 224 F.Supp. 807 (S.D. N.Y. 1963) at page 809, cited by Judge Gurfein in his opinion below (A. 110, 111):

> "* * * there is as little justification for inquiry into the factual basis upon which the arbitrators reached their judgment as there is for inquiry into the basis upon which a jury determination rests. An award within the scope of the submission is conclusive on fact issues and interpretation of law."

The burden of proof on the issue of whether partiality or some other defect specified in §10 or §11 of the Act was present during the arbitration is upon the party making such an allegation. See *Saxis Steamship Co.* v. *Multifacs International Traders, Inc., supra*, at 582. With respect to each of the items listed in §10 an §11, Judge Gurfein found that Zack had failed to sustain this burden.

As Judge Gurfein correctly recognized (A.8), it is not the Court's function to review the factual and legal deter-

minations of the arbitrator. Section 42 of the Commercial Arbitration Rules of the AAA, to which the parties bound themselves, provides that the arbitrator "may grant any remedy or relief which *he deems just and equitable* and within the scope of the agreement of the parties * * *" (Emphasis supplied). He need not give the reasons for his decision. *Bernhardt* v. *Polygraph Co. of America,* 350 U.S. 198, 203 (1956); *Wilko* v. *Swan,* 346 U.S. 427, 436 (1953); *Sobel* v. *Hertz, Warner & Co.,* 469 F.2d 1211, 1215 (2d Cir. 1972). His award is thus insulated from attack by the courts for erroneous findings of fact or misinterpretations of law. *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp., supra,* 247 F.2d at 808; *Oinoussian Steamship Corp. of Panama* v. *Sabre Shipping Corp., supra,* 224 F.Supp. at 807. It is irrelevant to consider whether a court of law would enforce the claims of either party. *Matter of Exercycle Corp. (Maratta),* 9 N.Y.2d 329, 337 (1961).

B. An Arbitrator Cannot Be Held to Have Exceeded His Powers Unless His Award Is Completely Irrational or Shows Manifest Disregard of the Law.

To the extent its position can be discerned from its somewhat obscure petition for certiorari, Zack seems to argue that the arbitrator did not properly apply the law of New York to the case, and thereby "exceeded his powers" (9 U.S.C. §10(d)) in that (1) he allegedly based his award on contracts which Zack claimed had been terminated and replaced by others, and (2) he apparently did not accept Zack's contention that the written agreements had been orally cancelled or modified. Additional arguments alleging bias, misconduct and other errors on the

part of the arbitrator and impropriety in his selection, made by Zack in the District Court and Court of Appeals and rejected therein, have been abandoned in the present petition. It now ascribes but one error to the courts below:

> "The single important error below was the court's refusal to do what is inherently necessary to ascertain when an award is claimed to be in excess of the powers of the arbitrator, viz; determine the truth of the facts on whether there was an excess of authority. This duty can only be performed by ascertaining the true facts that were set before the arbitrator." (Zack's petition at 27.)

The submission to the arbitrator in the case at bar was the broadest possible, providing for arbitration in accordance with the Rules of the American Arbitration Association of "[a]ny controversy arising under or in relation to the contract or any modification thereof." The words of this Court in *Wilko* v. *Swan, supra,* 346 U.S. at 436, are thus particularly appropriate.

> "In unrestricted submissions, * * * the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."

In *Wilko,* an agreement to arbitrate was not enforced precisely because interpretations of the law by arbitrators are not subject to judicial review, and an investor's agreement to arbitrate would constitute a waiver of the access to the federal courts the Securities Act intended he should have. It was the very existence of the general rule insulating an arbitrator's decision from review that prompted this Court to exclude from the arbitral process cases arising under the Securities Act.

To show "manifest disregard" of the law by the arbitrator sufficient to challenge the award, the respondent must prove "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Saxis Steamship Co.* v. *Multifacs International Traders, Inc., supra,* 375 F.2d at 582. Any such exception must be severely limited, because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings. *Ibid.*

Zack's repeated reliance on this Court's decisions in the *United Steelworkers* series of cases is particularly bizarre, in light of the confirmation in those decisions of the lack of merit in Zack's arguments. Although those cases involved arbitration under collective bargaining agreements pursuant to the Labor Management Relations Act and thus involved national policy considerations not entirely applicable to commercial litigation, the views expressed by the majority are, we submit, as appropriate here:

> "A mere ambiguity in the opinion of the arbitrator accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.
>
> * * *
>
> It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 598-99 (1960)

The *United Steelworkers* cases, far from supporting Zack's position, only reaffirm the principle that "[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960).

Nor does *Swift Industries, Inc.* v. *Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972) support Zack's position here. That decision, citing the New York Court of Appeals, stated as the applicable rule of law that "an award of an arbitrator is not subject to judicial revision unless it is 'completely irrational.' " 466 F.2d at 1131. This is indeed the rule in New York. *Lentine* v. *Fundaro*, 29 N.Y. 2d 382, 385-86 (1972); *Matter of National Cash Register Co.* (*Wilson*), 8 N.Y. 2d 377, 383 (1960).

Zack has failed to make such a showing of "complete irrationality" in the case at bar. At most, its quarrel with the award is only on matters of disputed facts, credibility and contract interpretation.

II

The arbitrator's award could rationally have been based on the contracts submitted to him.

Zack suggests that the arbitrator "exceeded his authority" by awarding Intsel recovery on contracts 50240 and 50617, as amended, contending (1) that contract 50240 had allegedly been "superseded" on or about June 23, 1969 and (2) that Zack had presented testimony at the hearing that the written contracts had been orally "rescinded" and replaced by a new agreement. That the legal and factual

issues raised by these assertions were clearly within the scope of the arbitrator's power to determine can be seen by referring to the arbitration agreement between the parties, originally contained in the contracts of January 13, 1969 (A. 7a) and August 7, 1969 (A. 8a) and which was repeated on all subsequent "change order" forms reflecting modifications of the contracts:

> "Any controversy *arising under or in relation to this contract or any modification thereof* shall be settled by arbitration * * * in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association * * *" (Emphasis supplied)

Under New York Law, it is clear that arbitration may be had as to all issues arising subsequent to the making of the contract, including the termination thereof, and that the issue of termination is for the arbitrators to decide. *Matter of Terminal Auxiliar Maritima S.A. (Winkler Credit Corporation)*, 6 N.Y. 2d 294, 298 (1959); *Matter of Lipman (Haeuser Shellac Co.)*, 289 N.Y. 76, 80 (1942). See also *Eastern Marine Corp.* v. *Fukaya Trading Co.*, 364 F. 2d 80, 85 (5th Cir. 1966). The factual and legal contentions asserted herein by Zack were presented at great length to the arbitrator (A. 29, 40, 45, 47) and after due consideration he made his award based on the written contracts as amended and the quantity of goods actually delivered, an award obviously within his power.

Zack repeatedly, and incorrectly, argues that its evidence at the hearing of an oral cancellation of the contracts was "undisputed" or "conceded". On the contrary, Intsel vigorously opposed those allegations and the docu-

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mentary evidence submitted on both sides tended to refute them (A.68). Of course, those issues of fact were for the arbitrator and from his decision, we can assume he determined them adversely to Zack. Introduction of all this evidence and repetition of the oral testimony by affidavit in the District Court was improper and meaningless. The trier of fact in this case was the arbitrator and the correctness of his factual decision was not before the Court.

If we understand Zack correctly, it is arguing that the arbitrator "disregarded the law" and "exceeded his authority" because in his award he referred to Instel's original contracts dated January 13, 1969 (#50240) (A.7-7a) and Aungust 7, 1969 (#50617) (A.8-8a). These contracts were subsequently amended and a complete list of the documents comprising the two contracts, as amended, appears in the record (A.64-67). At the hearing, Zack argued that as to #50240, only the amendment of June, 1969 (A.50, 51) was the contract, having replaced the original contract of January 13, 1969 (A.7-7a). This was vigorously disputed before the arbitrator and is contradicted by the very language of the June purchase order and "Change Order", which by their terms simply modify the January Agreement.

The most peculiar aspect of Zack's argument as to what the true contracts were is that even if its position in this regard were to be accepted, Intsel's claim would nevertheless be precisely the same and the amount of the award would also be the same. There is no disagreement that whether amended or replaced, the eventual contract #50240 was for 55,000 pounds of hollow bar (A.51) at

$.503 per pound (A.7) and the eventual contract #50617 was for 10,000 pounds of round rods at $.464 per pound (A.8). Since Intsel's confirmations with respect to both contracts contain the arbitration clause and neither side has ever questioned their authenticity, it is difficult to imagine what difference it could make whether the June documents were amendments of an earlier contract or new contracts. Since the matters submitted were contracts 50240 and 50617 in their entirety (A.70), this distinction without a difference could not affect the merits of the decision. In any event, as Judge Gurfein noted (A.113), the arbitrator did not purport to make his award only on the original contracts, but simply referred to them as the earliest documents containing the arbitration agreement (A.9).

Any suggestion that the damages in the award were computed incorrectly is self-contradictory and insupportable. Zack itself concedes that contract 50240, as amended or "superseded", was for 55,000 pounds and contract 50617 was for 10,000 pounds. At the hearing, evidence was presented to indicate that the pounds shipped slightly exceeded the pounds ordered, that Zack had approved these overages and that the invoice prices were based on the number of pounds actually shipped, accepted and retained by Zack (A.68). The amount of $35,253.60 is derived by simply multiplying the number of pounds actually shipped times the price per pound specified in the contracts (A.68-69). There was no miscalculation or other mistake in the award. Cf. 9 U.S.C. §11(a).

As noted above, the documents Zack says constituted the contract contained the same arbitration clause as the

earlier forms. Thus, its argument that there was "no arbitrable dispute" is totally unsupported. However, the time to make such an objection was when arbitration was demanded. The "threshold" issue of whether the contracts presented an arbitrable dispute cannot be decided after the parties have completed the entire arbitration process without objection.

III

Zack has shown no grounds for, nor does due process require, a trial *de novo*.

Zack contends that where an issue of fact has been raised as to whether the arbitrator exceeded his authority, the due process requirements of the Fifth Amendment to the United States Constitution mandate a full trial *de novo* of the facts that were submitted to the arbitrator. This argument not only misconstrues the nature of due process of law, but also completely ignores the essential nature and purpose of arbitration.

> "The Fifth Amendment guarantees no particular form of procedure, N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 351, 58 S.Ct. 904, 82 L.Ed. 1381, and in general there is no warrant in assuming a failure to grant a fair hearing by the lack of a trial in the strict or formal sense. The 'inquiry [should be] so fitted in its range to the needs of the occasion.' Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 820, 79 L.Ed. 1566" *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F.2d 126, 134 (6th Cir. 1942).

Due process only requires that a party have the opportunity to present his case. By "substituting arbitration as

the mode of trial" (*Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944)), the Arbitration Act does not deprive the parties of their right to be heard but merely permits the parties to agree voluntarily to a different form of hearing in order to expedite the resolution of the issues between them. Zack's petition herein errs in treating the District Court in this case as if it were the trier of fact. It is not. The trier of the facts at issue between the parties herein was the arbitrator and a trial in the District Court of the same issues that were presented at the arbitration hearing is unwarranted.

Zack voluntarily agreed to arbitration under the rules of the AAA. If it objected to the arbitration of Intsel's claim under the contracts, either because they had been terminated or because they were otherwise non-arbitrable, the time to raise that threshold issue was prior to the arbitration hearing. Having participated in the hearing and having presented all its arguments of fact and interpretation to the arbitrator, Zack cannot now say that the arbitration should never have been held. It had the opportunity to move for a stay of the arbitration on the ground that there was no arbitrable issue, but it waived that opportunity.

Zack argues that where issues of fact have been raised as to whether the arbitrator exceeded his authority, a full trial *de novo* should be held. But, of course, a review of the record herein discloses that no such issue of fact has been raised. This is not a case like *Hyman* v. *Pottberg's Executors*, 101 F.2d 262 (2 Cir. 1939), in which the arbitrators were also representatives of competing claimants to a common fund, thus suggesting on its face the possibility

of partiality, and where a trial was ordered as to that issue only. Nor is it similar to *Campbell* v. *American Fabrics Co.*, 168 F.2d 959 (2d Cir. 1948), where the evidence in the record, including the arbitrator's own sworn statement, indicated that he had substantially deviated from the narrow standards imposed upon him by the arbitration agreement. In the case at bar, there has been no showing of partiality or bias and the award of the arbitrator is within the bounds of the broad arbitration agreement. His decision was clearly within the bounds of rationality depending upon the factual issues presented at the hearing, the credibility of the witnesses and the arbitrator's reading of the contracts.

Conclusion

Zack's petition for a writ of summary reversal or of certiorari should be denied.

Dated: August 29, 1975

Respectfully submitted,

JOHN M. SCHWARTZ
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JOSEPH H. WEISS
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Of Counsel

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IN THE

Supreme Court of the United States

No. 75-197

October Term, 1975

In the Matter of the Arbitration
between INTSEL CORPORATION,
Petitioner-Respondent,

-against-

M.W. ZACK METAL COMPANY,
Respondent-Petitioner.

REPLY TO OPPOSITION TO WRIT OF CERTIORARI OR SUMMARY REVERSAL

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Restatement of the Law, 2nd Edition, Conflict of Laws, Section 25.

§ 25. Notice and Opportunity to be Heard

A state may not exercise judicial jurisdiction over a person, although he is subject to its judicial jurisdiction, unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard.

Comment:

a. Rationale. It is unjust for a state to seek to affect through its courts a person's interests without giving him a chance to protect those interests. For this reason, a state may not exercise such judicial jurisdiction as it may possess unless a reasonable method is employed to give the defendant notice of the proceeding and unless he is afforded a reasonable opportunity to be heard.

b. Judicial action without notice or opportunity to be heard. In the United States, the due process clause of the Fourteenth Amendment to the Constitution prohibits the States from taking action through their courts without having employed a reasonable method to inform the defendant of the proceeding or without having afforded him a reasonable opportunity to be heard. The due process clause of the Fifth Amendment prohibits the United States from taking similar action. A judgment rendered in this country without these requirements having been met is void, even in the State where rendered, and is not entitled to full faith and credit in sister States. To the extent that notice and opportunity to be heard are constitutional requirements, the decisions of the Supreme Court of the United States are controlling.

A judgment may be invalid either because a reasonable method of notification is not provided by the local law of the state in which the action is brought or because the method provided is not followed.

In a state in which the power of the legislature is not restrained by constitutional provisions, the legislature may authorize or direct its courts to render judgment without having given the defendant reasonable notice of the proceeding and a reasonable opportunity to be heard. Such judgments will be valid in the state where rendered but will neither be recognized nor enforced in other states.

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h. Opportunity to be heard. If the defendant was denied a reasonable opportunity to be heard, a judgment rendered against him will be void in the state of rendition itself, if this state is a State of the United States, and in any event will not be recognized or enforced in other states. This will be true even though the state had judicial jurisdiction over the defendant and even though he was given proper notice of the action. Notice to a defendant of the claim which is being made against him is of no value to him if he is denied the opportunity to defend against the claim. This may happen when in the particular action the conduct of the court is so flagrant as to deny the defendant the opportunity to be heard, such as when the court arbitrarily strikes out an answer which the defendant makes to the claim and renders judgment against him. The same is true when, although the defendant is given notice of the action, a judgment is rendered against him so shortly thereafter that he has no adequate opportunity to interpose a defense.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

In the Matter of the Arbitration
between INTSEL CORPORATION,

Petitioner-Respondent,

-against-

M.W. ZACK METAL COMPANY,

Respondent-Petitioner.

QUESTION

Has Intsel proven that an arbitrable dispute was placed before the arbitrator and that the award was within the scope of the agreement or of a modification thereof to support its entitlement to the award.

ARGUMENT

The answer to the question in the caption is, no. As the basic ground of this application is that no arbitrable issue was placed before the arbitrator because the agreements to arbitrate had been terminated:

(a) by a subsequently executed oral agreement and

(b) by application of New York law to the facts placed before the arbitrator,

Intsel should have met Zack's claims to the facts proving the foregoing. It does not. It does not deny that Zack made an oral agreement of novation with Besso, executive vice-president of Intsel, late in November to take in the late delivery of the goods for the purpose of minimizing Intsel's loss by selling them for Intsel's account and that Zack stored the goods and tried to sell them. Nor does it deny that the arbitrator should have applied New York law to those facts or that under New York law, this oral agreement effectively terminated the prior written agreements of purchase and sale without obligation on the part of Zack to pay the contract price for the goods delivered under the oral stipulation. In its opposition, Intsel does not deny that Zack talked with Besso to the effect mentioned and that the delivery of the goods was made under the oral agreement and not under the prior written contracts, or that Besso never testi-

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fied to contradict Zack's claims. Nor does Intsel deny that Krasnov had talked with Intsel all during September, the month of the agreed upon delivery at Detroit, and that Krasnov had cancelled the agreements late in September because he could not get a shipping date, let alone a delivery date out of Intsel for September.

The limits of the arbitration established by the contracts terminated were "Any controversy arising under or in relation to this contract or any modification thereof * * *". The arbitrator was not thus empowered to decide the question of termination of the contract and the evidence on that issue was submitted to him for the purpose of showing that his powers under the writings had ended. Despite Zack's clear entitlement under New York law to a dismissal of the arbitration, the arbitrator awarded under two documents, one of which is dated January 13, 1969, which is not at all a contract of parties, the contract price stipulated in the writings of June and August and September.

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The award simply disregarded the uncontroverted evidence of cancellation and of a later novation and the fact that Zack acted upon the novation agreement, and had no obligation to pay the contract price. Surely, this is evidence of an excess of power despite the boot-strap arguments of Intsel concluding that there was no proof of the arbitrator exceeding his powers. Modification is, and can never be a termination and an oral novation terminating prior written contracts can never be the contract which is to be arbitrated. It confuses the grant of power to arbitrate "any controversy arising under or in relation to this contract or any modification thereof", with the failure to grant power to arbitrate. The oral novation is neither the contract nor a modification of the superseded written contracts. Therein lies the error of Intsel.

A New York Court of Appeals case that discusses an award within and without the scope of the agreement granting arbitration is Mtr of Granite Worsted Mills (Cowen), 25 N.Y. (2) 451. The facts of the matter are the guides for the courts in determining

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that issue, just as this court has done in the Atkinson, Howard Johnson Co., and the Burnes cases cited at p. 37 of the petition.

Obviously, proceedings under the Arbitration Act in the Federal Courts are separate and differ from the proceedings at the arbitration hearing. Proceedings under the Arbitration Act are subject to the Federal Rules of Civil Procedure. Under these Rules, an issue of fact must be put to the test of a trial. A right granted by Congress under the Arbitration Act, is the right of the loser in an arbitration proceeding to claim that the arbitrator has exceeded his powers. How does the loser go about asserting such right; but by moving to vacate the award and assert the factual proof of the excess of power. Would the loser be foreclosed by the rule of case law that arbitrators' awards are not subject to supervision of the courts or that their findings of fact or conclusions of law are not subject to review by the courts? To apply these principles would be to defeat the clear man-

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date of Congress that a loser has the right to claim that the award is in excess of power. There must be a clear division then between when an award may not be reviewed and when it may be reviewed. It will not do, to do, as Intsel says, apply the law foreclosing review to every award of an arbitrator. This is patently erroneous. Nor may Intsel claim before the Federal Court in opposition to a motion to vacate the award that there was an acceptance of the goods by Zack under the writings when there was no proof of that fact before the arbitrator. Indeed, such a claim by Intsel would disregard its clear failure to deny that both cancellation and termination were effectuated by uncontroverted evidence. And, of course, in this case, there was no stenographic record of what evidence was placed before the arbitrator, so that, Zack was forced to rely upon the written documents offered or conceded before the arbitrator, and by affidavits stating what the parties claimed was orally testified to in the arbitration.

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The question then arises if opposing claims to the nature of the oral proof before the arbitrator arises in the District Court does that court have the power to acccpt one contention and reject the other without a trial where the power of the arbitrator is at issue. If an issue of fact is raised as to the nature of the evidence before the arbitrator, may a District Court decide that issue without a trial? Not anymore than any other issue of fact presented to it for resolution.

Intsel, on its part claims that the court may accept its statements of the evidence before the arbitrator without holding a trial. But it offers no cases to support that stand. Zack offers the act itself and the Potterberg and Campbell cases to support its claims.

Besides, Intsel's claims are not of facts but are of conclusions which are ambiguous, and do not contradict the fact statements of Zack. Intsel's claims are contained in the affidavit of Schwartz opposing the motion to vacate which is found at

pp. 55-69 of the appendix. In its opposition to this application it alludes to p. 68 of that affidavit as the source of its claims to facts allegedly contradictory of Zack's claims to a novation and cancellation. That page is attached hereto for this court's convenience. Nowhere in that page, nor in any other part of that affidavit is there a statement by Intsel that the cancellation and novation was not testified to before the arbitrator by Zack as is claimed in Zack's affidavit before the District Court. There is a statement on p. 68 that the award was for the quantities "delivered against the orders and accepted and retained by Zack. At the hearing, evidence was presented to indicate that immediately before delivery Intsel asked Zack if pursuant to common practice in the industry it could accept slight overages on the orders and that Zack indicated its approval".

Yet no claim is made as to who acted for Zack or for Intsel or when such acceptance was made. When it is recalled that only Mr. Fifield testified for Intsel before the arbitrator and by his own admission, Mr. Fifield testified that he had no

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personal knowledge of the matter, he could not, at the hearing, claim an acceptance of delivery in any quantity for Zack's own account. Zack's own affidavits before the District Court stated that Intsel's sole witness was Mr. Fifield who having said that he had no personal knowledge of the facts, before 1971, he did not utter a word in denial of Zack's claim to the uncontroverted evidence of cancellation and a novation before the arbitrator. The foregoing statement at page 68 could not therefore be competent to raise an issue respecting the factual claims of Zack to a proper cancellation or a novation agreement in accordance with New York law. Assuming it raises some doubt as to the truth of Zack's claim, a trial of the issue would have arisen. Schwartz had the opportunity to supply proof of the facts of his claim, but he did not take that opportunity. If a valid issue of fact appeared respecting the making and carrying out of the novation agreement, a trial of that issue should have been ordered by the

District Court. Zack's conclusion is that because no one testified for Intsel at the hearing denying the novation or the cancellation, those facts were uncontroverted and were binding upon the arbitrator and upon the District on the motion to vacate the award. The District Court should have dismissed the arbitration as a matter of law.

As it is the disregard of the proof by the arbitrator and by the District Court and later by the affirmance by the Court of Appeals, only resulted in the disregard of the plain sense of the facts and of the law applicable thereto. Such action is in plain derogation of Zack's rights. Where tribunals fail to follow their own Rules in deciding a matter, a fair hearing, as guaranteed by our constitution, is not had. See Restatement of the Law, Conflict of Laws, 2nd Edition; Section 25. The decision is void and may be attacked collaterally

Intsel overlooks this aspect of the case. Its reliance upon case law which denies the right of a review of the award, in this case, misconstrues

the point of the cases. Plainly, those principles apply where it can be said that the arbitrator acted within the scope of his authority. When he acts outside the scope of his authority, and, a question of fact is raised respecting whether the award is outside the scope of that authority, a court cannot refuse to examine the facts and pursuant to the rules of procedure, a trial must be had. The Potterberg and Campbell case applied that principle in divergent fact cases. Congress has not limited the right of the loser to claim and to prove entitlement to a vacature on the ground of excess of power. Intsel must be wrong in insisting that there is no review, and that Potterberg and Campbell are aberrations of the rule.

The rule that issues of fact must be subjected to the test of a trial is a constitutionally granted right and in this case, that right was taken from Zack by misapplied reasoning in favor of inapplicable law.

WHEREFORE this court is respectfully requested

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to reverse the Court of Appeal's judgment, summarily, with appropriate directions or to grant a writ of certiorari.

Respectfully submitted,

Robert W. Cauldwell

ROBERT W. CAULDWELL
ANTHONY B. CATALDO
Attorneys for petitioner

APPENDIX TO REPLY

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

Zack's various allegations that these contracts were orally "cancelled" before delivery or that there was an oral agreement at the time of delivery that Zack was accepting the goods conditionally. These allegations were made during the hearing and were vigorously opposed by Intsel. In fact, the documentary evidence submitted by both sides tended to indicate that the contracts had never been cancelled and that Zack had accepted delivery and retained the goods. The repeated assertions by Zack and its attorney that their allegations on these matters were "conceded" by Intsel is absolutely false and an unconscionable distortion of what occurred at the hearing.

THE COMPUTATION OF DAMAGES

20. Zack argues that the damages of $35,253.60 awarded by the arbitrator were excessive. On the contrary, the damages, as claimed by Intsel in its Demand for Arbitration and awarded by the arbitrator, were based precisely on the quantity of goods delivered against the orders and accepted and retained by Zack. At the hearing, evidence was presented to indicate that immediately before delivery Intsel asked Zack if pursuant to common practice in the industry it would accept slight overages on the orders and that Zack indicated its approval. The invoice prices were

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